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In the Supreme Court of the United States

OCTOBER TERM, 1997

JOSE A. CUEVAS-SEGARRA, AMNERIS MARTINEZ, THE CONJUGAL PARTNERSHIP CONSTITUTED BY THEM, ANTONIO R. CONCEPCION-VELAZQUEZ, AGNA I. MORALES, AND THE CONJUGAL PARTNERSHIP CONSTITUTED BY THEM,
PETITIONERS,

v.

MARIA LUISA CONTRERAS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "catch all" statement of Section 105(a) of the Bankruptcy Code ("Code"), which provides that bankruptcy courts may issue any order, process, or judgment that is necessary to carry out the provisions of the Code can be utilized to render superfluous the two year statute of limitations of Section 549(d) of that same law.

2. Whether the Fifth Amendment due process requirements mandate, at a minimum, a meaningful opportunity to be heard prior to an adjudication affecting property rights.

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ON WRIT OF CERTIORARI TO THE FIRST CIRCUIT COURT OF APPEALS

Jose A. Cuevas-Segarra, Amneris Martinez, their conjugal partnership, Antonio R. Concepcion-Velazquez, Agna I. Morales, and their conjugal partnership, ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit ("Court of Appeals") in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, A-1) is reported at 134 F.3d 458 (1st Cir. 1998). The order of the Court of Appeals denying Petitioners' petition for rehearing (App., *infra*, A-6) is unreported. The order of the United States District Court for the District of Puerto Rico ("District Court") (App., *infra*, A-8), affirming the United States Bankruptcy Court for the District of Puerto Rico's ("Bankruptcy Court") memorandum opinion and order, as amended, is unreported. The Bankruptcy Court's memorandum opinion and order finding Petitioners' liable to Respondent for $27,456.00 (App., *infra*, A-14) is unreported. The Bankruptcy Court's decision and order amending its memorandum opinion and order (App., *infra*, A-31) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on January 23, 1998. Petitioners' petition for rehearing was denied by the Court of Appeals on February 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law ....

11 U.S.C. § 105(a) relative to the powers of bankruptcy courts states:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the

> provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 549(d) provides as to the avoidance powers of a trustee in cases of postpetition transactions:

> (d) An action or proceeding under this section may not be commenced after the earlier of —
>
> (1) two years after the date of the transfer sought to be avoided; or
>
> (2) the time the case is closed or dismissed.

The full text of 11 U.S.C. § 549 is reproduced in the Appendix, (App., *infra*, A-58).

STATEMENT OF THE CASE

On October 6, 1982, Jose Mendez Rosado, Alejandra Becerra Espinosa, and the conjugal partnership constituted by them (collectively "Debtors"), filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code ("Code"), 11 U.S.C. 101 *et seq.*, with the Bankruptcy Court, said case is still pending and thus has not been closed or dismissed. On October 15, 1982, Johnny Elias Rivera ("Elias") was appointed as Debtors' Chapter 7 trustee.

Prior to the filing of their Chapter 7 petition, Debtors had filed a medical malpractice lawsuit with the Court of First Instance of Puerto Rico, Superior Section of San Juan ("Superior Court"). On July 6, 1983, Debtors filed an "Informative Motion" with the Bankruptcy Court, reporting the amendment of their bankruptcy schedules to include the malpractice action.

On December 6, 1983, Debtors filed an application to retain Wilfredo A. Geigel, Esq. ("Geigel"), as their special counsel, to prosecute the medical malpractice case on behalf of their bankruptcy estate. The Bankruptcy Court issued an order approving Debtors' application, stating that any agreement as to fees had to be approved thereby and that the trustee had to be a party to any settlement.

On July 30, 1986, the Bankruptcy Court issued an order terminating Elias' appointment, and appointing Hector L. Urrutia, Esq., ("Urrutia") as successor trustee in Debtor's Chapter 7 proceedings.

Thereafter, Geigel resigned as Debtors' special counsel and on August 26, 1988, Debtors, through Antonio R. Concepcion-Velazquez, Esq., ("Concepcion") filed a motion with the Bankruptcy Court for the designation of Concepcion and Jose A. Cuevas Segarra, Esq., ("Cuevas"), as Debtors' special counsel to prosecute the medical malpractice case.

On September 9, 1988, the Bankruptcy Court denied Concepcion's motion, without prejudice, since it failed to comply with Rule 2014 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bank.P.").[1] Rule 2014 (a) imposes the requirement of applying for the appointment of attorneys which are to

[1] Fed.R.Bank.P. 2014 (a) states:

> (a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's

provide services to a bankruptcy estate on the trustee, debtor-in-possession[2] or a committee of creditors. The case at bar, being a Chapter 7 liquidation, there was no debtor-in-possession, neither was a committee of creditors appointed. Therefore, it was Urrutia's responsibility to apply to the Bankruptcy Court for the appointment of Cuevas and Concepcion as special counsel to the bankruptcy estate.

After the denial of Concepcion's motion, Cuevas wrote several letters to Urrutia, requesting Urrutia to submit the necessary documents to the Bankruptcy Court, in order for Cuevas and Concepcion to be authorized to represent Debtors in the medical malpractice case.

On January 30, 1989, Cuevas again wrote to Urrutia, complaining that Urrutia had not answered Cuevas' previous communications and indicating that Debtors had informed Cuevas that the Bankruptcy Court had released Urrutia from further responsibility and that Debtors' Chapter 7 case had been closed.

On January 31, 1989, Urrutia answered Cuevas indicating in a hand written note on Cuevas' letter of January 30, 1989, that if what Cuevas stated was true, Cuevas would be right, the Bankruptcy Court would have lost jurisdiction, that he had not received any notice, and suggesting to Cuevas to visit the Office of the Clerk of the Bankruptcy Court to corroborate what was stated by Cuevas.

On February 6, 1989, the parties to the medical malpractice case filed a stipulation with the Superior Court, whereby

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connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

[2] 11 U.S.C. § 1107(a) states:

> (a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

Debtors agreed to accept $70,000.00, in full satisfaction of their claims. On February 21, 1989, the Superior Court issued a judgment approving the $70,000.00 settlement.

During May, 1989, Cuevas and Concepcion received $32,520.00 for their services in the medical malpractice case, a sum that was divided equally between them. Only $27,456.00, of the $32,520.00, are the object of the controversy at bar, since the difference relates to professional services rendered by Cuevas and Concepcion to Debtors' children, not parties to the bankruptcy proceedings.

On September 16, 1993, Urrutia resigned as Debtors' trustee. Upon Urrutia's resignation, Donald F. Walton, Esq., Acting United States Trustee for Region 21, performed as trustee in Debtor's Chapter 7 case. He did so until the appointment of Respondent as trustee on February 4, 1994. Respondent was authorized by the Bankruptcy Court to act as her own counsel.

On June 2, 1994, Respondent filed a complaint with the Bankruptcy Court, *inter alia*, against Petitioners, alleging, as her third cause of action, that Petitioners were improperly in the possession, custody or control of the $27,456.00, received by Cuevas and Concepcion, which constituted property of Debtors' estate, since Cuevas and Concepcion had represented Debtors in the medical malpractice case without leave from the Bankruptcy Court, as required by Fed.R.Bankr.P. 2014. On October 3, 1994, Respondent filed an amended complaint to include additional parties as defendants.

In her complaint, Respondent alleged that Cuevas and Concepcion were retaining the $27,456.00, payment received by them for their postpetition professional services in the medical malpractice case, in violation of 11 U.S.C. §§ 541(a) and 542. As a relief, Respondent prayed for the return of these funds.

On January 30, 1995, and February 8, 1995, Petitioners filed their answers to Respondent's amended complaint, denying that Respondent was entitled to the relief requested and asserting as an affirmative defense that Respondent's cause of action against them was time-barred.

On March 7, 1995, Respondent filed a motion for summary judgment seeking judgment in her favor on the third cause of action of her complaint, praying for the return of the $27,456.00, received by Cuevas and Concepcion.

On March 20, 1995, Petitioners filed a joint cross-motion for summary judgment with the Bankruptcy Court. Therein Petitioners, *inter alia*, asserted that the complaint filed against them was time-barred by 11 U.S.C. § 549(d).

On July 20, 1995, filed and entered on July 21, 1995, the Bankruptcy Court issued a memorandum opinion and order granting Respondent's motion for summary judgment and denying Petitioners' cross-motion. The corresponding judgment was issued on July 31, 1995, and was filed and entered on August 1, 1995. In its judgment, the Bankruptcy Court directed Petitioners to return to Debtors' estate the $27,456.00, received by Cuevas and Concepcion (App., *infra*, A-29).

On October 27, 1995, filed and entered on November 3, 1995, the Bankruptcy Court issued a decision and order, *inter alia*, clarifying that Cuevas and Concepcion were each responsible for $13,728.00, of the $27,456.00, plus interest (App., *infra*, A-31). On November 30, 1995, the Bankruptcy Court filed and entered an amended judgment in consonance with its decision and order of October 27, 1995. Petitioners filed appeals from said judgment to the District Court.

On December 11, 1996, filed and entered on December 16, 1996, the District Court entered an order and a judgment affirming the judgment of the Bankruptcy Court (App., *infra*, A-8).

On January 15, 1997, Petitioners filed their notices of appeal from the judgment of the District Court to the Court of Appeals.

On January 23, 1998, the Court of Appeals filed and entered its *per curiam* opinion affirming the District Court, premised on the broad powers of Section 105(a) of the Code (App., *infra*, A-1).

On February 12, 1998, Petitioners filed a motion for rehearing with the Court of Appeals, which was denied on February 24, 1998 (App., *infra*, A-6).

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneously decided an important question of federal law of first impression relating to the administration of the federal bankruptcy system, that has not been, but should be, decided by this Court due to its national importance. Further, Petitioners' Constitutional due process rights have been violated by the Court of Appeals' directive to the District Court to review Cuevas' and Concepcion's professional conduct to determine whether they should be subject to disciplinary procedures, without first providing Cuevas and Concepcion with a meaningful opportunity to be heard.

I. The Court Of Appeals' Interpretation Of Section 105(a) Of The Bankruptcy Code Renders Superfluous Section 549(d) Of That Same Code. Reading Section 105(a), As The Court Of Appeals Did, Will Result In The Obliteration Of The Two Year Statute Of Limitations Of Section 549(d), Which Is A Matter For Congress To Decide.

The present case presents the important question of whether an interpretation of a congressional enactment can render superfluous another portion of the same law. *Kawaauhau* v. *Geiger*, ____ U.S. ____, 118 S.Ct. 974 (1998). The Court of Appeals held that the broad authority conferred by Section 105(a) of the Code provides "teeth" to the equitable powers of a bankruptcy court and that the Bankruptcy Court was empowered thereunder to direct Petitioners to turn over the fees received by Cuevas and Concepcion from the settlement of Debtors' malpractice litigation, notwithstanding the statutory period of Section 549(d) having elapsed by the time of

the filing of Respondent's complaint for the turnover of said fees (App., *infra*, A-4, A-5).

In the context of the detailed provisions of the Bankruptcy Code, judicial intervention to fill gaps is the exception rather than the rule. *See In re Westmoreland Coal Co.*, 213 B.R. 1 (Bankr. Ct. D. Co. 1997) and Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 Bankr. Dev. J. 289. 317-18 (1994). Kelch states:

> Detailed and precise schemes are less likely to be ambiguous than those of a more general character. The more detail in a structure to be interpreted, the more suitable is plain-meaning analysis of structure. The Bankruptcy Code, being a detailed structured whole, similar to other codes like the Uniform Commercial Code ("UCC") is subject to an interpretative mandate distinct from, for example, the interpretation of the common law .... A code, one intended to broadly administer conduct in a specified area, ... is not typically designed with gaps for judicial assemblage. In this context of pervasive legislative pronouncement, active judicial intervention is dispensable due to the lack of gaps requiring judicial saturation through construction of non-linguistic interpretation. These characteristics of breadth of coverage, detail and precision describe the Bankruptcy Code.
>
> ....
>
> ... Further, Congressional behavior of frequent revisions to the Code suggests that Congress intends to control the bankruptcy process through amendment rather than judicial fiat [unlike the Sherman Antitrust Act].

The provisions of the Bankruptcy Code cannot be read in isolation but should be interpreted in light of the remainder of the statutory scheme. *United Savings Assoc. of Texas* v. *Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988);

In re Howard, 972 F.2d. 639 (5th Cir. 1992).

Under established principles of statutory construction courts have the duty to give effect, if possible, to every clause and word of the Bankruptcy Code, paying careful attention to the actual statutory language. *In re Tel-Central Communications, Inc.*, 212 B.R. 342 (Bankr. Ct. W.D. Mo. 1997); *In re 400 Madison Avenue Ltd. Partnership*, 213 B.R. 888 (Bankr. Ct. S.D. N.Y. 1997). Courts of Appeals must interpret the provisions of the Code according to the plain meaning of the individual provision as long as the provision's language is unambiguous. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989); *In re Fegeley* 118 F.3d 979 (3rd Cir. 1997).

The plain language of Section 549 provides that in order to avoid a transfer of property of a bankruptcy estate made after the commencement of a bankruptcy case, a trustee must file an action or proceeding within the earlier of two years after the date of the transfer sought to be avoided or the closing or dismissal of the bankruptcy case. Since Debtors' Chapter 7 case has not been closed or dismissed, it is the first part of the statute which applies to the facts of this case.

It is with Section 549 where the inquiry should end, "for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *U.S.* v. *Ron Pair Enterprises, Inc.*, 489 U.S. at 241 (citing *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

Section 549 is the sole provision addressing the powers of a trustee to avoid or set aside postpetition transfers of property of a bankruptcy estate, including the recovery of compensation of professionals who have acted without court approval on behalf of an estate. *See In re Rose*, 25 B.R. 744, 746 (Dist.Ct. E.D. MO 1982); *In re Dola International Corp.*, 88 B.R. 950, 955 (Bankr. Ct. Minn. 1988).

Several policies support the conclusion that Section 549 is the exclusive means by which a trustee may attack postpetition transfers. First, it is only fair that the very broad powers of a trustee under Section 549 be subject to certain definite

limitations. Time is perhaps the only limitation which appears in Section 549. This section contains a strict two-year statute of limitations which is "keyed not to the appointment of the trustee but to the date of the transfer." *In re Sattler's, Inc.*, 73 B.R. 780, 791 (Bankr. Ct. S.D. N.Y. 1987). *See also, In re Haugen Construction Service, Inc.*, 88 B.R. 222 (Bankr. Ct. D. N.D. 1988), *aff'd*, 881 F.2d 1079 (8th Cir. 1989); *In re Majesto Electro Industries, Ltd.*, 71 B.R. 84 (Bankr. Ct. M.D. Penn. 1987); *In re Burstein-Applebee Co.*, 30 B.R. 779 (Bankr. Ct. W.D. Mo. 1983).

Second, rules of statutory construction favor this interpretation, since specific provisions of a statute control over those of general statute. *In re Players' Pub, Inc.*, 45 B.R. 387 (Bankr. Ct. D. Mass. 1985). In *In re Davidson*, 120 B.R. 777, 787 (Bankr. Ct. D.N.J. 1990), the court referring to Sections 349 and 507 of the Bankruptcy Code stated: "[i]n reconciling these two statutory provisions, this court accepts the tenet of statutory construction which provides that regardless of the inclusiveness of the general language of a statute, it does not apply or prevail in matters specifically dealt with in another part of the same enactment." *See also, In re Nobleman*, 968 F.2d 483, 488 (5th Cir. 1992), *aff'd*, 508 U.S. 1020 (1993); *In re Walkup*, 183 B.R. 884 (Bankr. Ct. E.D. Cal. 1995); *In re McKinney*, 174 B.R. 330 (Bankr. Ct. S.D. Ala. 1994).

The facts of the case at bench show that the transfer to Cuevās and Concepcion was postpetition and that at the time of the filing of Respondent's complaint with the Bankruptcy Court the two year limitation period of Section 549 had run.

Nevertheless, the Court of Appeals utilized the catch all equitable provisions of Section 105(a) to decide that notwithstanding the avoidance action against Petitioners having been filed more than five years after the postpetition transfer, and thus being barred under Section 549(d), Respondent could prosecute the same under Section 105(a).

The scope of the authority regarding the equitable powers of bankruptcy courts has been a matter of debate. Two points of view have developed as to the courts' inherent discretion

in utilizing the general equitable powers of Section 105(a). One advocates a restrictive interpretation, the other a broad one. It has been acknowledged that at present, the latter view prevails. 2 *Collier on Bankruptcy*, ¶105.01 [2] (Matthew Bender 15th ed. rev. 1998).

Nevertheless, this does not mean that Section 105 can be applied in an unrestricted manner, when other provisions of the Code apply. As stated in *Collier*, *supra*, ¶105.01 [2], at 105-6,-7:

> There are, however, limits. Regardless of the view adopted, it should be universally recognized that the power granted to the bankruptcy courts under section 105 is not boundless and should not be employed as a panacea for all ills confronted in the bankruptcy case. Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code or mandates of other state and federal statutes. As aptly put by one court, section 105 does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity" (footnotes omitted).

In *In re Ludlow Hospital Society, Inc.*, 124 F.3d 22, 27 (1st Cir. 1997), the Court of Appeals recognized the inherent limitations of Section 105(a) by indicating: "[a]lthough expansively phrased, section 105(a) affords bankruptcy courts considerably less discretion than first meets the eye, and in no sense constitutes 'a roving commission to do equity.' " (citing *Chiasson* v. *J. Louis Matherne & Assocs. (In re Oxford Mgt., Inc.)*, 4 F.3d 1329,1334 (5th Cir.1993)); *In re Plaza de Diego Shopping Center, Inc.*, 911 F.2d 820, 824 (1st Cir. 1990). The Court of Appeals in *Ludlow*, 124 F.3d at 27, stated:

> the equitable discretion conferred upon the bankruptcy court by section 105(a) is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code.

The broad powers conferred by Section 105(a) to the bankruptcy courts have been considered analogous to those of a court of equity. *In re Davis*, 730 F.2d 176 (5 Cir. 1984); *In re Pirsig Farms, Inc.*, 46 B.R. 237 (Dist.Ct. Minn. 1985); *In re Apollo Molded Products, Inc.*, 83 B.R. 189 (Bankr.Ct. Mass. 1988); *In re El Patio, Ltd.*, 6 B.R. 518 (Bankr. C.D. Ca. 1980). However, these powers are not without limits. "[T]he [bankruptcy] court can in no manner consider itself above the legal principles which it is bound to apply." *In re Schwaninger*, 57 B.R. 553, 556 (Bankr. Ct. W.D. Mo. 1986). Bankruptcy judges have no power to ignore the plain language of a statute in order to reach results in keeping with notions of equity. *In re Kelly*, 841 F.2d 908 (9th Cir. 1988). *See also, Johnson* v. *First Nat. Bank of Montevideo, Minn.*, 719 F.2d 270 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). The bankruptcy courts act as courts of equity and have broad powers, which must be exercised consistently with the provisions of the Code. *In re Medical Plaza Associates, Ltd.*, 67 B.R. 879 (Dist. Ct. W.D. Mo. 1986). Bankruptcy courts cannot create new substantive rights in exercising their equity powers. *In re Riso*, 57 B.R. 789 (Dist. Ct. N.H. 1986); *In re International Gold Bullion Exchange, Inc.*, 53 B.R. 660 (Bankr. Ct. S.D. Fl. 1985); *In re Sutton*, 43 B.R. 250 (Bankr. Ct. Conn. 1984).

Equity may not be invoked to defeat clear statutory language, nor reach results inconsistent with a statutory scheme established by the Code. *In re Powerine Oil Co.*, 59 F.3d 969 (9th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996). It is settled that Section 105(a) does not operate by itself and must be utilized in an integrated manner with other provisions of the Code, as an aid in their enforcement and not inconsistently therewith. Section 105(a) is to be employed to bolster the clear

and unambiguous statutory language of the Code, not to render the same nugatory. *In re Oxford Management, Inc.*, 4 F.3d 1329,1333 (5th Cir. 1993); *United States* v. *Sutton*, 786 F.2d 1305, 1307 (5th Cir.1986); *In re Texas Consumer Finance Corporation*, 480 F.2d 1261, 1265 (5th Cir. 1973). The Court of Appeals applied Section 105(a) in a manner inconsistent with the express provisions of the Code, since the statutory period of Section 549(d) bars the action undertaken against Petitioners. Equitable considerations notwithstanding, there is a public interest in that cases be finalized and controversies resolved as expeditiously and economically as possible. Parties should not be exposed to judicial proceedings which can be prosecuted indefinitely. *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981). Specific statutory periods must be observed and not disregarded on equitable grounds, since equity follows the law.

Bankruptcy courts cannot use their equity powers to fashion substantive rights and remedies not contained in the Code or rules or to negate available substantive rights or remedies. *In re Smith*, 21 F.3d 660 (5th Cir. 1994). *See also, In re SPM Mfg. Corp.*, 984 F.2d 1305, *reh'g and reh'g en banc denied*, (1st Cir. 1993). "Bankruptcy court's equitable actions, however, cannot contravene specific provisions of the Bankruptcy Code." *In re Terex Corp.*, 984 F.2d 170 (6th Cir. 1993).

Notwithstanding, the Court of Appeals failed to consider the specific provisions of Section 549 as the sole source of applicable law and decided to invoke Section 105(a), in contravention of the principles of law referred to above. That is, when a specific provision of the Code applies to a matter under consideration, there is no need to reach for the broad powers of Section 105(a) and "create" a new law in equity. *In re JKJ Chevrolet, Inc.*, 158 B.R. 614 (Dist. Ct. E.D. Va. 1993), *aff'd*, 26 F.3d 481 (4th Cir. 1994).

The existence of Section 549 cannot be ignored, nor its presence as written law disregarded through the equity powers contained in Section 105(a). *See Marin* v. *England*,

385 U.S. 99 (1966). In doing so, the Court of Appeals obliterated the express provisions of Section 549(d) and did away with the doctrine of equitable tolling. *In re Olsen*, 36 F.3d 71 (9th Cir. 1994); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946).

The doctrine of equitable tolling is a rule of law that is the natural outgrowth of the discovery doctrine "read into every federal statute of limitations." *In re Olsen*, 36 F.3d at 73. According thereto, an action under Section 549, filed after the statutory period, would not be barred provided a trustee acted diligently in discharging his duties and could not or should not have known that a transfer had taken place. In the words of *Olsen*, for the equitable tolling of Section 549(d) to take place, the doctrine requires that the trustee be kept "in the dark 'without any fault or want of diligence or care on his part'". *In re Olsen*, 36 F.3d at 73 (citing *United Insurance*, 14 F.3d at 1384, quoting *Lampf, Pleva, Lipkind, Prupis, Petigrow* v. *Gilbertson*, 501 U.S. 350, 363, *reh'g denied*, 501 U.S. 1277 (1991)).

Under the doctrine of equitable tolling, the two-year statute of limitations of Section 549(d) could be tolled when a trustee is unaware of the facts surrounding a postpetition transfer and, despite reasonable care, such a transaction went unnoticed. *In re Thornton's Millwork, Inc.*, 209 B.R. 645, 647 (Bkrtcy.M.D.Pa. 1997).

It is under such circumstances that the equitable powers of Section 105(a) could be applied, the statutory period of Section 549(d) notwithstanding. However, under no circumstances can the provisions of Section 549 be ignored or obliterated. Equitable tolling harmonizes the two-year statute of limitations of Section 549(d) with the equitable powers of Section 105(a), in a clear example of the interplay of Section 105(a) with other provisions of the Code.

In the case at bar, there can be no equitable tolling of the statutory period of Section 549(d). Urrutia failed to properly administer the bankruptcy estate entrusted to him, specifically, the medical malpractice action before the Superior

Court. Urrutia's omissions in performing his duties as trustee are part of the fourth cause of action of Respondent's amended complaint, pending before the Bankruptcy Court. In the same, Respondent seeks damages against Urrutia for his breach of fiduciary duties to the bankruptcy estate resulting from the settlement approved by the Superior Court (App., *infra*, A-50).

The above discussion underscores the need of a decision by this Court to determine the extent of the powers of Section 105(a) *vis a vis* specific provisions of the Bankruptcy Code, particularly Section 549(a), a matter of the utmost national importance in the judicial process pertaining to the administration of bankruptcy.

2. THE COURT OF APPEALS' DIRECTIVE TO THE DISTRICT COURT TO REVIEW THE PROFESSIONAL CONDUCT OF PETITIONERS JOSE A. CUEVAS-SEGARRA AND ANTONIO R. CONCEPCION-VELAZQUEZ TO DETERMINE WHETHER THEY SHOULD BE SUBJECT TO DISCIPLINARY PROCEDURES, CONSISTED OF AN ADJUDICATION AFFECTING PETITIONERS' PROPERTY RIGHTS WITHOUT PROVIDING THEM WITH A MEANINGFUL OPPORTUNITY TO BE HEARD, INCONSISTENT WITH THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

Through is opinion and judgment, the Court of Appeals directed the District Court to review the professional conduct of Cuevas and Concepcion to determine whether they should be subject to disciplinary procedures.

Considering the factual issues and causes of action of Respondent's amended complaint before the Bankruptcy Court, Cuevas' and Concepcion's actions should be first gauged by said Court within the context of the pending adversary proceeding, particularly since neither the Bankruptcy Court nor the District Court in their respective decisions (App., *infra*, A-8, A-14, A-31) addressed the issue of Cuevas' and Concepcion's professional conduct.

The controversy at bar originates from the decision of the Bankruptcy Court granting Respondent's motion for summary judgment, as to the third cause of action of her amended complaint, for the turnover of the fees received by Cuevas and Concepcion. This decision was affirmed by the District Court (App., *infra*, A-29).

The remaining causes of action of Respondent's amended complaint involve issues of material facts as to the different parties' legal responsibilities and liabilities in the execution of the medical malpractice settlement.

To this effect, the first and second causes of action of Respondent's amended complaint are directed against the Debtors, for the revocation of their discharge and for the turnover of the funds received by them under the settlement. Said causes of action involve issues of material facts which must be addressed by the Bankruptcy Court to determine Debtors' knowledge and participation in the settlement and the information given by them to Cuevas and Concepcion as to the status of the bankruptcy case. (App., *infra*, A-48).

The fourth cause of action of the amended complaint deals with Respondent's action for damages against Urrutia for his negligence in the performance of his fiduciary duties to Debtors' estate, specifically his lack of supervision and inaction as to the undertakings that led to the settlement (App., *infra*, A-50). Again, the Bankruptcy Court will have to deal with issues of fact as to Urrutia's involvement in the settlement, his failure to monitor and administer Debtors' estate, and the nature and extent of his written and verbal communications with Cuevas and Concepcion regarding the status of the bankruptcy proceedings, factors which go to the heart of Cuevas' and Concepcion's professional conduct and which remain undetermined. In addition, Petitioners' cross claim against Urrutia is also pending before the Bankruptcy Court. Therein, Petitioners maintain that Urrutia is liable to them, since Cuevas and Concepcion acted in accordance with Urrutia's advice (App., *infra*, A-54, 56).

The Court of Appeals failed to consider Cuevas' and Concepcion's reliance on Urrutia's, a lawyer, inaction in carrying his duties as trustee and in reference to their appointment to act as special counsel for Debtors' estate, which conveyed to Cuevas and Concepcion an understanding that their actions, in settling the medical malpractice case and receiving compensation, were proper. It was not until Respondent's complaint, that Cuevas and Concepcion were faced with a demand for the turning over of the fees received by them.

In doing so, the Court of Appeals did not consider Cuevas' and Concepcion's good faith efforts to comply with Fed.R.Bankr.P. 2014, through their requests to Urrutia. It was Urrutia's failure to comply with his obligations under 11 U.S.C. § 327 (a);[3] that is, to obtain the appointment of Cuevas and Concepcion, as Debtors' special counsel, which caused the noncompliance with Fed.R.Bankr.P.2014.

Further, the Court of Appeals failed to consider the predicament in which Cuevas and Concepcion found themselves, after the Bankruptcy Court denied their petition to act as special counsel for Debtors and their dependency on Urrutia to move the Bankruptcy Court to appoint them as such. Urrutia failed to comply with Cuevas' requests to this effect.

Petitioners underscore that Urrutia was aware of the lawsuit before the Superior Court. He failed to monitor said case and to advise the parties thereto, including Cuevas and Concepcion, as to the status of the bankruptcy proceedings and that the settlement had to be approved by the Bankruptcy Court. Urrutia's inaction in the administration of the case created a leadership vacuum, particularly when Urrutia knew

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[3] 11 U.S.C. 327(a) states in relevant part:

(a) [e]xcept as otherwise provided in this section, the *trustee* with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title (Emphasis supplied).

or should have known from Cuevas' inquiries that his involvement and guidance were necessary.

There was no intention or undertaking on Cuevas' and Concepcion's part to keep Urrutia ignorant of the proceedings before the Superior Court. Urrutia knew of such action.

The fifth cause of action of the amended complaint deals with Respondent's request that the settlement agreement be declared null and void for having been obtained without the approval of the Bankruptcy Court and on the basis of alleged erroneous information provided by Cuevas and Concepcion to the Superior Court (App., *infra*, A-50, 51).

The sixth cause of action of the amended complaint involves Respondent's allegation that co-defendant, Home Insurance Company ("Home"), is liable to the bankruptcy estate for disbursing monies directly to Debtors, with knowledge of the need of obtaining the Bankruptcy Court's approval of the settlement. Home has filed a cross-claim against Petitioners, Debtors, and Urrutia, alleging that it acted on the representations made to the Superior Court during the course of the approval of the settlement (App., *infra*, A-51, 52).

The pending causes of action involve genuine issues of fact, in reference to which Petitioners due process rights require their determination after a hearing. They involve the nature and extent of Cuevas' and Concepcion's knowledge, participation, and representations as to the status of the bankruptcy proceedings, their relationship with the state court litigation, and all aspects of their professional conduct. Cuevas and Concepcion are entitled to a determination of these issues at an evidentiary hearing in the pending adversary proceeding, where the particular issues are to be litigated.

There is no principle more ingrained in our system of justice than the right to be heard. In *Windsor* v. *McVeigh*, 93 U.S. 274 (1876), this Court roundly condemned a procedure in which the land of confederate soldiers was seized and the respondent not given an opportunity to be heard. The Court

referred to the action of the trial court as no more than a "judicial fiat" totally inconsistent with due process.

In *Boddie* v. *Connecticut*, 401 U.S. 371, 377-8 (1971), this Court stated:

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claim of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876). *See Baldwin* v. *Harle*, 1 Wall. 223, 17 L.Ed. 531 (1864); *Hovey* v. *Elliot*, 167 U.S. 409 (1897). The theme that 'due process of law signifies a right to be heard in one's defence' [sic], *Hovey* v. *Elliot*, *supra*, at 417, has continually recurred in the years since *Baldwin*, *Windsor*, *and Hovey*. Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Id.*, at 313 (footnote omitted).
>
> . . . What the Constitution does require is '*an opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Hanover Tr. Co.*, *supra*, at 313.

In *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), this Court was confronted with the argument that due process right to be

heard applied only when the issue was "necessary" items such as wages and welfare benefits. After reviewing *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the Court stated:

> Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.

Moreover, Petitioners are entitled to have the issues of fact referred to the District Court resolved in a trial forum where the fact finder hears live witnesses and considers all the pertinent evidence. Through the summary motion procedure, which originated the case at bar, neither the Bankruptcy Court, the District Court, nor the Court of Appeals weighed the evidence. Summary judgment admits no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails. If the facts permit more than one reasonable inference, the Court on summary judgment may not adopt the inference least favorable to the non-movant. *In re Varrasso*, 37 F.3d 760, 763 (1st Cir. 1994); *Casas Office Machines, Inc.* v. *Mita Copystar America Inc.*, 42 F.3d 668, 683 (1st Cir. 1994).

In sum, considering the stage where the litigation is, that the factual scenario relative to the execution of the settlement remains unsettled, and that directive of the Court of Appeals to the District Court to review the conduct of Cuevas and Concepcion to determine whether they should be subject to disciplinary procedures was issued, without Petitioners being granted an opportunity for a hearing prior thereto, Petitioners request that it be set aside.

CONCLUSION

For all the forgoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

JOSE A. CUEVAS-SEGARRA,
AMNERIS MARTINEZ,
the conjugal partnership
constituted by them,
ANTONIO R. CONCEPCION-VELAZQUEZ,
AGNA I. MORALES,
and the conjugal partnership
constituted by them,
By their attorney,

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United States Court of Appeals
For the First Circuit

No. 97-1234

JOSE A. CUEVAS-SEGARRA, & AMNERIS MARTINEZ,

APPELLANTS,

v.

MARIA LUISA CONTRERAS,

APPELLEE.

ANTONIO R. CONCEPCION-VELAZQUEZ,
AGNA I. MORALES,

APPELLEES.

No. 97-1265

JOSE A. CUEVAS-SEGARRA, & AMNERIS MARTINEZ,

APPELLEES,

v.

MARIA LUISA CONTRERAS,

APPELLEE.

ANTONIO R. CONCEPCION-VELAZQUEZ,
AGNA I. MORALES,

APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[HON. SALVADOR E. CASELLAS, *U.S. District Judge*]

Before
TORRUELLA, *Chief Judge*,
LYNCH, *Circuit Judge*,
and DICLERICO, JR.,* *District Judge*.

Charles A. Cuprill-Hernandez, with whom *Carlos A. Surillo-Pumarada* and *Charles A. Cuprill-Hernandez Law Offices* were on brief for appellants.

Maria Luisa Contreras, with whom *Maria Luisa Contreras Law Offices* was on brief for appellees.

January 23, 1998

Per Curiam. The bankrupt estate of Jose Mendez-Rosado and his wife, Alejandra Becerra, had few assets. One of the most significant was a malpractice claim against Dr. Karl Horn and Dr. Julio Westerband. On August 26, 1988, attorneys Antonio Concepcion and Jose A. Cuevas-Segarra filed a Motion for Designation of Special Counsel, hoping to obtain bankruptcy court approval to settle the malpractice suit on behalf of the debtors. The Motion was denied without prejudice because the attorneys had failed to abide by Bankruptcy Rule 2014, which required the inclusion of a verified statement that the attorneys were disinterested persons.[1] Instead of amending the application to include the verified statement, the attorneys settled the case in February 1989, without bankruptcy court approval or notice to creditors, dividing $70,000 between themselves and the debtors.[2]

For five years, the players in the bankruptcy proceedings took no notice of the settlement. In February 1994, a new bankruptcy trustee, Maria Luisa Contreras, was appointed to the case. Ms. Contreras soon learned of the settlement and immediately filed a complaint with the bankruptcy court

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[1] The relevant part of Bankruptcy Rule 2014 reads:

> The application [for employment of attorneys] shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any persons employed in the office of the United States trustee.

[2] Cuevas and Concepcion claim that they thought the bankruptcy case was closed, and that bankruptcy court approval was no longer necessary for the representation. Nothing to that effect ever issued from the bankruptcy court.

alleging that Cuevas and Concepcion were improperly in possession of property belonging to the debtors' estate. On November 3, 1995, the bankruptcy court entered a decision and order that, pursuant to 11 U.S.C. §§105(a), 362(c), and 542(a), Cuevas and Concepcion must return $27,456.00 in fees that they received from the settlement. Cuevas and Concepcion appealed this decision to the federal district court in Puerto Rico, which subsequently affirmed the bankruptcy court opinion. They again appealed the decision, and we now reaffirm the judgment for the trustee, Ms. Contreras.

The decisions of the bankruptcy and district courts are premised upon three alternative grounds. First, the decisions rely upon Bankruptcy Code (the "Code") § 105(a), a "catch-all" section which provides a bankruptcy court with broad powers to enforce the Code, preserving the integrity of the bankruptcy system.[3] Second, reliance is placed on Bankruptcy Code § 362(c), which provides for an automatic stay of any act against property of the estate unless approved by the court.[4] Any non-approved monetary transaction affecting estate assets is thus voided. Finally, the opinions look to Bankruptcy Code § 542(a), which requires an entity in control

[3] The section reads:

> The Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[4] The section provides for:

> (1) the stay of an act against the property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
>
> (2) the stay of any other act under subsection (a) of the section continues until the earliest of —
>
> (A) the time the case is closed;
>
> (B) the time the case is dismissed; or
>
> (C) if the case is a case under chapter 7 of this title concerning an individual . . . the time a discharge is granted or denied.

of property of a bankrupt estate to return that property to the trustee.[5]

We need to look no further than § 105(a) to affirm the courts' decisions. The broad authority conferred by this section of the Code provides "teeth" to the equitable powers of a bankruptcy court. *See Noonan* v. *Secretary of Health & Human Servs. (In re Ludlow Hosp. Soc., Inc.)*, 124 F.3d 22, 27 (1st Cir. 1997) ("[s]ection 105(a) empowers the bankruptcy court to exercise its equitable powers — where 'necessary' or 'appropriate' — to facilitate the implementation of other Bankruptcy Code provisions"). A proper application of § 105(a) will effectuate the Bankruptcy Code without fashioning or altering substantive rights of debtors or creditors, ensuring that "technical considerations will not prevent substantial justice from being done." *Pepper* v. *Litton*, 308 U.S. 295, 305 (1939); *see also Noonan*, 124 F.3d at 27; *Gens* v. *Resolution Trust Corp.*, 112 F.3d 569, 576 (1st Cir. 1997).

In light of these standards, we conclude that the broad authority of § 105(a) was properly brought to bear against Cuevas and Concepcion in this case. A bankruptcy court has a duty to review the fees paid to professionals and § 105(a) provides authority to effectuate judgments such as the denial of Cuevas and Concepcion's Motion for Designation of Special Counsel. In spite of the fact that they had been refused court permission to settle the pending malpractice action, these attorneys forged ahead, settling the case and failing to apprise the creditors or the court of the payments received by the debtors and by themselves. Such behavior undermines the integrity of the bankruptcy system and public confidence

[5] The section reads:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

therein. *See In re E Z Feed Cube Co.*, 123 B.R. 69, 74 (Bankr. D. Or. 1991) (holding that professionals' fees must be returned to the trustee under § 105(a) in a similar situation).

Most of the energy expended in this case has been directed toward the dispute over whether § 542(a) can be used to recover a post-petition transfer. The appellants argue that only § 549 provides for such recoveries, and that a two-year statute of limitations bars the trustee's action in this case. This argument is moot. Although the equitable powers of the bankruptcy court are limited, *see Noonan*, 124 F.3d at 27, only a hopelessly strained interpretation of the Code would tie the court's hands while attorneys ignore a direct court ruling, hoping that the statute of limitations will run before the creditors, trustees or judge catch on.

Cuevas and Concepcion protest that much of the blame in this case belongs to Hector L. Urrutia, the original trustee in this case and a predecessor to Contreras. Cuevas and Concepcion allegedly wrote numerous letters to Urrutia requesting that he submit to the bankruptcy court an application for their employment, which would have paved the way for them to receive court approval for their representation. According to the authors, these letters received no response. Nevertheless, it is undisputed that Urrutia ultimately advised Cuevas and Concepcion to check with the bankruptcy court before taking any action regarding the malpractice action. They did not do so.

For the reasons stated herein, the decision of the district court is **affirmed.** Costs and attorney's fees are awarded to Ms. Contreras. Furthermore, the district court is directed to review the conduct of attorneys Concepcion and Cuevas-Segarra in this matter to determine whether they should be subject to disciplinary procedures.

United States Court of Appeals
For the First Circuit

No. 97-1234

JOSE A. CUEVAS-SEGARRA, & AMNERIS MARTINEZ,
APPELLANTS,
v.
MARIA LUISA CONTRERAS,
APPELLEE,

ANTONIO R. CONCEPCION, AGNA I. MORALES,
APPELLEES.

No. 97-1265

JOSE A. CUAVES-SEGARRA, ET AL.,
APPELLEES,
v.
MARIA LUISA CONTRERAS,
APPELLEE,

ANTONIO R. CONCEPCION, AGNA I. MORALES,
APPELLANTS.

TORRUELLA, *Chief Judge*,
LYNCH, *Circuit Judge*,
and DICLERICO, JR., *Circuit Judge*.

ORDER OF COURT

Entered: February 24, 1998

Upon consideration of appellant's Petition for Rehearing and Reconsideration,

It is ordered that the Petition for Rehearing and Reconsideration be denied.

By the Court:
Phoebe D. Morse, Clerk

By MARY E. O'CALLAGHAN
Administrative Manager

[cc: Ms. Contreras, Messrs. Cuprill-Hernandez, Concepcion-Velazquez

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 96-1133 (SEC)
Bankruptcy Appeal

IN RE: MARIA LUISA CONTRERAS, TRUSTEE,
PLAINTIFF-APPELLEE,

v.

JOSE MENDEZ ROSADO, ET AL.,
DEFENDANTS-APPELLANTS.

ORDER

Pending before the Court is a bankruptcy appeal from the opinion and order and judgment of the United States Bankruptcy Court for the District of Puerto Rico ("Bankruptcy Court") entered on July 21, 1995 and August 1, 1995, respectively, as amended by the Bankruptcy Court's order of October 27, 1995. In its order, the Court denied appellants' joint cross motion for summary judgment and granted appellee's motion requesting entry of summary judgment against certain co-defendants. This Court has jurisdiction to entertain the present appeal pursuant to 28 U.S.C. § 158(a) and Federal Rules of Bankruptcy Procedure 8001(a) and 8002(a). On November 13, 1995, appellant filed this appeal. Upon careful scrutiny of the applicable law and the parties' arguments, the Bankruptcy Court's decision is AFFIRMED.

The issue on appeal is whether the Bankruptcy Court erred in denying appellant's joint cross motion for summary judgment and granting appellee's motion for summary judgment on the third cause of action against appellants in the amount of $13,728.00, together with interest at the legal rate from May 1989 until full repayment.

Factual Background

On October 6, 1982, Jose Mendez Rosado and Alejandra Becerra Espinosa ("Debtors") filed a voluntary petition under 11 U.S.C. Chapter 7 before the Bankruptcy Court. On October 17, 1982, the Court appointed Johnny Elias Rivera ("Elias Rivera")as Chapter 7 Trustee.

Prior to the filing of Debtors' Chapter 7 proceedings, in 1981 Debtors had filed a medical malpractice lawsuit against Karl Horn, Julio Westernband and their respective insurance companies before the Superior Court of Puerto Rico, San Juan Section ("Superior Court") Case No. 81-3773(803). On July 6, 1983, Debtors filed a motion to amend their schedules, in order to include the above mentioned tort claim.

On December 6, 1983, Debtors filed an application to retain Wilfredo A. Geigel, Esq. to prosecute the medical malpractice case. The Bankruptcy Court approved Debtors' motion and provided that any agreement had to be approved by said Court and that the Trustee had to be a part of the same.

On July 30, 1986, the Court also issued an order terminating Elias Rivera's appointment as Debtors' Chapter 7 Trustee, and Hector L. Urrutia ("Urrutia") was appointed successor Trustee. On August 26, 1988, Antonio Concepcion filed a motion on behalf of Debtors, which indicated that Wilfredo A. Geigel had resigned his representation in the malpractice action. Concepcion also requested the Court to appoint him and Jose A. Cuevas Segarra, Esq. as special counsels for Debtors in connection with case no. 81-3773(803). The Bankruptcy Court denied Concepcion's motion for failure to comply with Bankruptcy Rule 2014.

After the denial of the initial application for employment, no further applications were filed with the Bankruptcy Court requesting the employment of Cuevas or Concepcion to represent the Debtors in the malpractice action. Notwithstanding the Court's denial, Cuevas and Concepcion continued to represent the Debtors in the malpractice action.

Debtors entered a settlement stipulation in their medical malpractice case, whereby the plaintiffs (Debtors) accepted in full satisfaction of their claims the amount of ($70,000.00). Said settlement was approved by the Superior Court by judgment dated February 21, 1989. However, the settlement was not approved by the Bankruptcy Court, as required by Judge Lamoutte's Order, nor were any of the funds turned over to the Bankruptcy Court. Attorneys Cuevas and Concepcion received $32,520.00 from the settlement of the malpractice action, $27,546.00 of which was the subject of controversy at the Bankruptcy Court. On September 16, 1993, Urrutia resigned as trustee and Donald Walton was appointed as successor trustee. On February 2, 1994, Maria Luisa Contreras was appointed as trustee, succeeding Donald Walton.

On June 2, 1994, appellee filed the complaint against appellants. Appellants filed an answer to the complaint denying appellee's entitlement to the relief requested and asserting as an affirmative defense that appellee's cause of action was time-barred.

On March 7, 1995 appellee filed a motion for summary judgment against appellants, arguing that appellants were improperly in the possession, custody or control of property of the estate and that pursuant to 11 U.S.C. §542(a), they should be directed to deliver the same to appellee.

On July 21, 1995, the Bankruptcy Court determined that the payment to Cuevas and Concepcion was not made pursuant to an application for compensation before the Bankruptcy Court. The Court also held that creditors and other parties in interest did not receive notice of a request for fees by Concepcion and Cuevas, and the payment was not approved by the Bankruptcy Court.

The Court determined that the trustee was entitled to turnover of the payments made to Cuevas and Concepcion pursuant to 11 U.S.C. §105(a) and, accordingly, granted summary judgment in favor of the trustee. Cuevas and Concepcion now appeal this ruling.

Applicable Law/Analysis

The Bankruptcy Court's findings of fact shall be upheld unless they are clearly erroneous, and the Bankruptcy Court's conclusions of law shall be reviewed *de novo*. *T.I. Fed. Credit Union* v. *Delbonis*, 72 F.3d 921, 928 (1st Cir. 1995).

Upon review of the proceedings below, we find that the court acted properly in ordering the turnover of payments. The Bankruptcy Code, 11 U.S.C. §105(a) states:

> [t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The Bankruptcy Court noted in its opinion, and we agree, that "one of the inherent powers and duties of a bankruptcy court relates to reviewing fees paid to professionals." The Court relied on *In re E Z Feed Cube Co., Ltd.*, 123 B.R. 69, 73 Bankr. D.Or. 1991), which held that the trustee court have funds turned nover pursuant to 11 U.S.C. §105(a), despite the fact that the statute of limitations under §549 had expired.

That Court noted:

> [i]t is of the utmost importance that [the] court act to preserve the integrity of the bankruptcy system and to maintain public confidence therein. This court must regulate the conduct of its officers to ensure that such conduct complies with the Bankruptcy Code and Rules. Id. at 74.

Upon review of the factual findings of the bankruptcy court, we find that the payment process to appellants Cuevas and Concepcion was vitiated by a plethora of procedural irregularities too frequent and serious to ignore. As noted above, the Bankruptcy Court did not approve the settlement reached in the malpractice action, as required by Judge

Lamoutte's order. None of the funds were turned over to the Bankruptcy Court. The payments to Cuevas and Concepcion were not made pursuant to a petition for compensation before the Bankruptcy Court. There was no notice to the creditors and other interested parties of a request for fees by Concepcion and Cuevas. This scenario compelled the Bankruptcy Court to order the turnover of monies obtained by Concepcion and Cuevas. The Bankruptcy Court acted properly, in view of these circumstances.

Applicability of § 549 to Actions Brought Under § 542

Usually when an attorney receives unauthorized compensation from property of a Chapter 7 bankruptcy estate, the trustee may recover the unauthorized compensation pursuant to 11 U.S.C. §549. The section enables the trustee to avoid an unauthorized transfer of property of the estate.

The Bankruptcy court noted that ordinarily, a trustee was precluded from recovery due to the two-year statute of limitations period prescribed by §549. Notwithstanding the limitations of this statute, the Court allowed recovery for the trustee pursuant to 11 U.S.C. §542(a). This section reads:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

The Bankruptcy Court held that Section 549 and §542 provided alternative remedies for recovery as, it noted: "§549 applies to actions to recover property of the estate brought under §549, but that it does not place a time limit on actions for turnover of property that may be brought under other sections, such as §§542, 105 and 362." The Court cogently expounded on the interplay between §549 and 542, and upon

careful review of the applicable law, we see no reason to disturb such finding.

The Court also found that the appellants could not acquire legal title to the funds under a state law theory because when they acquired the funds the automatic stay of 11 U.S.C. §362(c) applied. This section reads:

> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
> (2) the stay of any other act under subsection (a) of the section continues until the earliest of —
> (A) the time the case is closed;
> (B) the time the case is dismissed; or
> (C) if the case is a case under chapter 7 of this title concerning an individual . . . the time a discharge is granted or denied.

The Court found that the Debtors received a discharge of their debts, but the case remained open. Since the trustee had not relinquished the funds obtained by Cuevas and Concepcion, they were still property of the state and subject to the automatic stay. Accordingly, reasoned the Court, the monetary transactions by Cuevas and Concepcion violated the automatic stay and were void unless approved by the Court. *I.C.C.* v. *Holmes Transp., Inc.*, 931 F.2d 984, 987-88 (1st Cir. 1991). Upon de novo review of the bankruptcy court's legal conclusions, we see no reason to disturb the Bankruptcy Court's determination. Accordingly, the Bankruptcy Court's decision is **affirmed** and appellants petition is hereby **DISMISSED.** Judgment shall follow accordingly.

SO ORDERED.

In San Juan, Puerto Rico, this 11th day of December, 1996.

ILLEGIBLE
M. CONTRERAS
A. CONCEPCION
OB
ILLEGIBLE 12/16/96

S E CASELLAS

SALVADOR E. CASELLAS
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTIRCT OF PUERTO RICO

Case No. 82-01460 (GAC)
Chapter 7
Adv. No. 94-0044

IN RE:
JOSE MENDEZ ROSADO AND
ALEJANDRA BECERRA ESPINOSA,
DEBTORS,

MARIA LUISA CONTRERAS, TRUSTEE,
PLAINTIFF,
v.
JOSE MENDEZ ROSADO, ET AL.,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion of the trustee for summary judgment brought under Fed.R.Civ.P. 56, made applicable to adversary proceedings in bankruptcy cases by Fed.R.Bankr.P. 7056, in connection with an adversary proceeding brought by the trustee against, among others, attorneys who represented the debtors in a state court action while this bankruptcy case was pending. The trustee seeks summary judgment against the state court attorneys, Jose Cuevas Segarra (hereinafter "Cuevas") and Antonio Concepcion (hereinafter "Concepcion"), as well as against their spouses and their conjugal partnerships. (Collectively, in this opinion, the Court may refer to Cuevas, Concepcion, their spouses and their conjugal partnerships as "the defendants.") The defendants have also filed a joint cross motion for summary judgment against the trustee.

With respect to the defendants, in the trustee's third cause of action in her amended complaint she seeks turnover to the

estate, pursuant to 11 U.S.C. § 542, of certain unauthorized post-petition transfers of property of the estate to Cuevas and Concepcion. The defendants request summary judgment against the trustee claiming that the trustee's action must be brought under 11 U.S.C. § 549 and that the statute of limitations under this section has expired. In the alternative the defendants argue that they have acquired legal title to the estate property by prescription and that they may not now be ordered to turn over the funds under any section of the Bankruptcy Code. For the reasons stated below, the Court grants the trustee's motion for summary judgment and denies the defendants' joint cross motion for summary judgment.

FACTS

1. In 1981, prior to the filing of this petition in bankruptcy, the debtors filed a medical malpractice action (hereinafter "malpractice action") against Karl Horn, Julio Westernband and their respective insurance companies before the Superior Court of Puerto Rico, San Juan Part (hereinafter "Superior Court"), Case No. 81-3773(803).

2. On October 6, 1982, the debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.

3. Johnny Elias Rivera was appointed as the Chapter 7 trustee.

4. On July 6, 1983, the debtors filed an informative motion to amend their bankruptcy schedules to include the malpractice action as an asset of the estate.

5. On December 6, 1983, the debtors filed an application to retain Wilfredo A. Geigel, Esq. to prosecute the malpractice action.

6. The Court approved the debtors' application to retain Wilfredo A. Geigel, provided that any agreement reached in the malpractice action had to be approved by the Bankruptcy Court.

7. The debtors received a discharge in bankruptcy on June 13, 1984.

8. Elias Rivera later filed a report in which he advised of the pendency of the malpractice action before the Superior Court and indicated that the bankruptcy case could not be closed until the malpractice action was concluded.

9. Elias Rivera's appointment as trustee was terminated by the Bankruptcy Court and Hector Urrutia (hereinafter "Urrutia") was appointed as successor trustee.

10. On August 26, 1988, Concepcion filed a motion on behalf of debtors, which indicated that Wilfredo Geigel had resigned representation in the malpractice action and requested the appointment of Concepcion and Cuevas as special counsel.

11. The application for employment was denied by the Bankruptcy Court without prejudice on September 7, 1988 for failure to comply with Federal Rule of Bankruptcy Procedure 2014.

12. After the denial of the application for employment, Cuevas wrote several letters to Urrutia regarding the necessity of being appointed by the Bankruptcy Court to continue representation of the debtors in the malpractice action. In the last letter, Cuevas indicated that the debtor had received a discharge after completing payments under a plan, that the case was closed and that the bankruptcy court had lost jurisdiction over the settlement of the malpractice action. Urrutia wrote back on the bottom of the letter stating that if what Cuevas was saying was correct, the Bankruptcy Court had lost jurisdiction. Urrutia suggested that Cuevas go to the Clerk's Office of the bankruptcy court to verify the information. (Translation Ours).

13. After the denial of the initial application for employment, no further applications were filed with the Bankruptcy Court requesting the employment of Cuevas or Concepcion to represent the debtors in the malpractice action.

14. A stipulation was reached in the malpractice action and it was approved by the Superior Court by judgment dated February 21, 1989.

15. In May of 1989, Cuevas and Concepcion were paid $32,520 for their services in the malpractice action.

16. Neither the stipulation in the malpractice action nor the payments to Cuevas and Concepcion were approved by the Bankruptcy Court.

17. On September 16, 1993, Urrutia resigned as trustee and Donald Walton was appointed as successor trustee.

18. On February 2, 1994, Mara Luisa Contreras was appointed as trustee, succeeding Donald Walton.

19. Maria Luisa Contreras, as trustee, commenced this adversary proceeding more than two years after the payments were made to Cuevas and Concepcion.

20. The trustee contends that $27,456 of the sum paid to Cuevas and Concepcion is property of the estate and subject to turnover.

JURISDICTION AND PROCEDURE

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b) as a matter arising under 11 U.S.C. § 542 of the Bankruptcy Code. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E).

STANDARD FOR SUMMARY JUDGMENT

Under Fed.R.Civ.P. 56(c), made applicable to bankruptcy proceedings by Fed.R.Bankr.P. 7056, summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322, (1986). On a motion for summary judgment, the inferences drawn from the facts presented must be viewed in the light most favorable to the party opposing the motion. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). There is no genuine issue for trial if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co.*

v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

Property of the Estate

The trustee seeks to recover $27,456 of the post-petition payments made to Cuevas and Concepcion in May of 1989 as proceeds of the malpractice action. Regarding the interaction between state law and bankruptcy law in determining what is property of the estate,:

> [w]hether the debtor has a legal or equitable interest in property is a question of applicable nonbankruptcy law, usually state law. Once it is established that, under applicable nonbankruptcy law, the debtor has a legal or equitable interest in property as of the petition date, the question of whether that interest is estate property is strictly a question of bankruptcy law.

1 Robert E. Ginsberg & Robert D. Martin, Bankruptcy Text, Statutes, Rules, § 5.01[b][1] (3d ed. Supp. 1994) (footnotes omitted).

In the present case, at the time of the filing of the bankruptcy petition, the debtors had a cause of action against certain doctors and their insurers. Under state law the debtors had a property interest in the malpractice action. Accordingly, whether the cause of action became property of the estate upon the filing of the bankruptcy petition, is determined only by bankruptcy law. The Bankruptcy Code indicates, with certain exceptions not applicable here, that the estate is composed of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Thus, under this section, the malpractice action became property of the bankruptcy estate at the time of the filing of this petition. Any amounts subsequently paid to the debtors and their attorneys resulting from the stipulation reached in the malpractice action were also property of the bankruptcy estate as proceeds of property of the estate pursuant to 11 U.S.C. § 541(a)(6).

Necessity of Attorney Apointment to Represent Estate and Necessity of Filing Application for Compensation to Receive Payment for Services

Under the Bankruptcy Code, attorneys seeking to pursue a cause of action on behalf of the estate, must be appointed for this purpose by the Bankruptcy Court. The Bankruptcy Code provides that:

> the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a). In August of 1988, when Cuevas and Concepcion submitted their application for employment, the Federal Rules of Bankruptcy Procedure provided that:

> [a]n order approving the employment of attorneys . . . pursuant to § 327 . . . of the Code shall be made only on application of the trustee or committee, stating the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants.

Fed.R.Bankr.P. 2014(a).

Even after an order approving the employment of an attorney is entered, the attorney must file an application for compensation before the Bankruptcy Court in order to be compensated for services performed. In 1989 when Cuevas and Concepcion received funds from the estate, the Bank-

ruptcy Code provided that "[a]fter notice to the parties in interest and the United States Trustee and a hearing, . . . the court may award to a . . . professional person employed under section 327 . . . reasonable compensation for actual, necessary services rendered by such . . . professional person, or attorney. . . ." 11 U.S.C. § 330(a)(1)-(a)(1)(A). The Federal Rules of Bankruptcy Procedure also provided that:

> An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity.

Fed.R.Bankr.P. 2016(a).

Power of the Court With Respect to Compensation Paid to Professionals

The Bankruptcy Code provides that:

> [t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a). One of the inherent powers and duties of a bankruptcy court relates to reviewing fees paid to professionals. *In re E Z Feed Cube Co., Ltd.*, 123 B.R. 69, 73 (Bankr. D.Or. 1991). The Court in *In re E Z Feed Cube Co., Ltd.*, held that the trustee could have funds turned over pursuant to 11 U.S.C. § 105(a), despite that the statute of limitations under § 549 had expired. The Court reasoned that:

> [i]t is of the utmost importance that [the] court act to preserve the integrity of the bankruptcy system and to maintain public confidence therein. This court must regulate the conduct of its officers to ensure that such conduct complies with the Bankruptcy Code and Rules.

Id. at 74. The court also pointed out in a footnote that "[i]t must be remembered that no applications or notice were ever sent to creditors apprising any interested party or the court of the payments received by the defendant." *Id.* at 74 n.2.

In this case, after Attorney Geigel resigned representation of the debtors in the malpractice action, Concepcion filed an application on behalf of the debtors with the Bankruptcy Court seeking the appointment of Cuevas and himself as special counsel in the malpractice action. The Bankruptcy Court found that the application did not comply with Federal Rule of Bankruptcy Procedure 2014. Accordingly, the application was denied. No application conforming with Fed.R.Bankr.P. 2014 was ever filed. Nonetheless, Cuevas and Concepcion

continued to represent the debtors in the malpractice action.

The settlement ultimately reached in the malpractice action was not approved by the Bankruptcy Court, as required by Judge Lamoutte's Order, nor were any of the funds turned over to the Bankruptcy Court. Cuevas and Concepcion received $32,520 from the settlement of the malpractice action, $27,456 of which is subject to this turnover action. The payment to Cuevas and Concepcion was not made pursuant to an application for compensation before the Bankruptcy Court. Creditors and other parties in interest did not receive notice of a request for fees by Concepcion and Cuevas. The payment was not approved by the Bankruptcy Court. Thus, the payments made to Cuevas and Concepcion were improper as a matter of law. Under these circumstances, this Court finds that, irrespective of the statute of limitations under § 549, the trustee is entitled to turnover of the payments made to Cuevas and Concepcion pursuant to 11 U.S.C. § 105(a).

Statute of Limitations for Filing Avoidance Actions Under § 549 Does Not Apply to Turnover Actions Brought Under § 542

Ordinarily, when an attorney receives unauthorized compensation from property of a Chapter 7 bankruptcy estate, the trustee could seek recovery of the unauthorized compensation under 11 U.S.C. § 549. This section allows a trustee to avoid an unauthorized transfer of property of the estate. In the present case, however, any attempt by the trustee to recover the post-petition payments to Cuevas and Concepcion under § 549 is clearly barred by § 549's two year statute of limitations.

The trustee in this case seeks to recover the payments made to Cuevas and Concepcion under 11 U.S.C. § 542. This section provides that:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title,

> . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). Citing the legislative history of this section and case law, it is Cuevas and Concepcion's position that 11 U.S.C. § 542 only applies to entities holding property of the estate on the date of the filing of the petition.

The Court notes that the statute itself refers to an entity in possession, custody or control of property during the case. This suggests that application of the section is not limited to entities holding property of the estate on the date of the filing of the petition. Moreover, the Court finds that the legislative history of the statute is in conflict. While portions of the legislative history suggest that 11 U.S.C. § 542 only applies to entities holding property of the estate on the date of the filing of the petition, the legislative history also states that:

> [s]ubsection (a) of this section requires anyone holding property of the estate on the date of the filing of the petition, or property that the trustee may use, sell, or lease under section 363, to deliver it to the trustee.

(HR rep. No. 595, 95th Cong, 1st Sess. 369 (1977); S. Rep. No. 989, 95th Cong, 2d Sess. 84 (1978)). It further provides that, "[t]he section makes clear that any entity, other than a custodian, is required to deliver property of the estate to the trustee or debtor in possession whenever such property is acquired by the entity during the case. . . ." (124 Cong.Rec. H11096-97 (daily ed. Sept. 28, 1978); S17413 (daily ed. Oct. 6, 1978); remarks of Rep. Edwards and Sen. DeConcini). Based on the language of the statute and the legislative history, the Court does not find the argument compelling that the statute, on its face or based on its legislative history, only applies to entities holding property of the estate on the date of the filing of the petition.

Cuevas and Concepcion also argue that to allow the use of 11 U.S.C. § 542 to recover a post-petition transfer would obliterate the statute of limitations imposed by 11 U.S.C.

§ 549, since there is no statute of limitations found in 11 U.S.C. § 542. Cuevas and Concepcion accordingly urge the Court to adopt the reasoning of the court in *In re 31-33 Corp.*, 100 B.R. 744 (Bankr. E.D.Pa. 1989) and hold that the trustee may only proceed under § 549 and not under § 542.

In the case of *In re 31-33 Corp.*, the court refused to allow a trustee to use § 542 to recover a $13,890 post-petition commission paid to a real estate broker pursuant to an order of the court. In that case, the real estate broker had not previously sought court appointment. And like the present case, the trustee's motion was brought more than two years after the payment to the real estate broker. The court noted that the broker was not aware of the requirement that she obtain court appointment. The court also found that two policy reasons strongly favored denying recovery to the trustee. These are that the trustee's broad powers should be subject to some time limitation and that allowing recovery under § 542 would obliterate the difference between § 542 and § 549. The court also went on to indicate that the equities did not favor allowing the trustee to recover since the trustee was appointed well within the limitation period under § 549 and the trustee had unexplained delays in presenting the motion. Accordingly, the court found that even if the motion were properly brought under § 542, there is an implicit 'reasonable period of time' limitation and it had expired.

This Court does not find the reasoning of *In re 31-33 Corp.*, persuasive as applied to this case. In addition to the fact that the language of § 542 and portions of the legislative history strongly suggest that it applies to entities holding property of the estate during the case, it is also true that often there is more than one section that a trustee may proceed under to recover unauthorized post-petition transfers. Although § 549 would be the most obvious section under which to proceed, if it were available, the trustee in this case could just as easily have sought relief under 11 U.S.C. § 362. This section does not have a statute of limitations, while a case remains open and may be used even when the § 549 limitation period has

expired. See generally, *In re Germansen Decorating, Inc.*, 149 B.R. 517 (Bankr. N.D.Ill.-1992).

Because unauthorized post-petition transfers may be recovered under sections other than § 549 and not be subject to the two year statute of limitations found in § 549, the difference between § 549 and other statutes allowing recovery of unauthorized post-petition transfers has, for all practical purposes, already been obliterated. Thus, the Court finds that § 549 applies to actions to recover property of the estate brought under § 549, but that it does not place a time limit on actions for turnover of property that may be brought under other sections, such as §§542, 105 and 362. Moreover, in this case the trustee was not appointed prior to the expiration of the two year statute of limitations found in § 549 and there have been no unexplained delays by the trustee in bringing suit. Thus, if there is an implicit "reasonable period of time" limitation for bringing suit under § 542, the Court finds that it has not expired.

The Court finds that the trustee may use 11 U.S.C. § 542 to seek turnover of the post-petition payments to Cuevas and Concepcion. Thus, applying 11 U.S.C. § 542, the Court finds that Cuevas and Concepcion are entities in possession, during the case, of property that the trustee may use under section 363 of this title. The $27,456 received by Cuevas and Concepcion is not of inconsequential value. Wherefore, the trustee is entitled to turnover.

Legal Title to the Property: Violation of the Automatic Stay

Cuevas and Concepcion argue that if the Court finds that 11 U.S.C. § 542 is available to the trustee in seeking turnover, the Court should find that the funds are no longer property of the estate. Cuevas and Concepcion argue that the trustee is not entitled to turnover of the funds because Cuevas and Concepcion acquired legal title over the funds at issue by prescription pursuant to the Civil Code of Puerto Rico.

The Court finds that the defendants could not acquire legal title to the funds under a state law theory because when they acquired the funds the automatic stay of 11 U.S.C. § 362 applied. The Bankruptcy Code provides that:

> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
> (2) the stay of any other act under subsection (a) of this section continues until the earliest of —
> (A) the time the case is closed;
> (B) the time the case is dismissed; or
> (C) if the case is a case under chapter 7 of this title concerning an individual . . . the time a discharge is granted or denied.

11 U.S.C. § 362(c). "The language of section 362(c) is clear and unambiguous. In the case of an act against property of the estate, the stay continues until the property is no longer property of the estate." 2 Collier on Bankruptcy 362-62, (15th ed. Supp. 1995).

In the present case, the debtors received a discharge of their debts, but the case remained open. Because the funds collected by Cuevas and Concepcion had not been abandoned by the trustee, they were still property of the estate. The Bankruptcy Code prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). "The third paragraph of section 362(a) is directed to actions, whether judicial or private, seeking to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 2 Collier on Bankruptcy 362-38 (15th ed. Supp. 1995) (footnote omitted). Moreover, it is irrelevant whether the debtors voluntarily made the transfer to Cuevas and Concepcion. See *In re Germansen Decorating, Inc.*, 149 B.R. 517 (Bankr. N.D.Ill. 1992). Thus, the actions by Cuevas and Concepcion in taking possession of the funds were in violation of the automatic stay. Actions in taking possession of property of the estate in violation of the

stay are generally void and without legal effect, unless condoned by the court. *I.C.C.* v. *Holmes Transp., Inc.*, 931 F.2d 984, 987-88 (1st Cir. 1991) (citations omitted). Therefore, the defendants may not now claim that they acquired legal title to the funds pursuant to a state law theory. As discussed by the Court in *In re Germansen Decorating, Inc.*, 149 B.R. at 520, since there is no statute of limitations, while a case remains open, for recovery of property obtained in violation of the stay, the trustee is entitled to recover the payments made to Cuevas and Concepcion.

Successor Trustee is Not Bound by Acts of Former Trustee

In Cuevas' answer to the trustee's motion for summary judgment, he raises for the first time the argument that the trustee, as a successor trustee, is bound by the acts and representations of the former trustee. He cites no legal authority for this proposition.

A successor trustee is the proper party plaintiff in an adversary proceeding against a former trustee for breach of fiduciary duty. See *In re Elegant Equine, Inc.*, 155 B.R. 189 (Bankr. N.D.Ill. 1993). Because a successor trustee has the right to sue a former trustee for breach of fiduciary duty, the successor trustee cannot be bound by the acts and representations of a former trustee.

In the present case, if the representations which Cuevas and Concepcion attribute to Urrutia were made, they were contrary to law and the orders of the Bankruptcy Court. Accordingly, the present trustee, as a successor to Urrutia, is not bound by his alleged acts and representations.

CONCLUSION

Pursuant to 11 U.S.C. §§ 105(a), 542(a) and 362, the defendants will be required to deliver to the trustee, and account for, the $27,456 of property of the estate.

ORDER

Wherefore, IT IS ORDERED that the trustee is granted summary judgment on the third cause of action. The defendants' joint cross motion for summary judgment is denied. The defendants, Jose Cuevas Segarra, his spouse, Amneris Martinez, and the conjugal partnership constituted between them and Antonio Concepcion, his spouse, Agna Morales, and the conjugal partnership constituted between them are liable to the trustee on the third cause of action in the amount of $27,456.

There being no just reason for delay, the Clerk shall enter judgment in favor of the trustee and against the aforementioned defendants on the third cause of action, in the sum of $27,456 together with interest thereon at the legal rate from May 1989 until repaid.

The trustee is also granted costs attributable to the third cause of action in this adversary complaint. The trustee shall file a motion with a statement of costs within thirty days. The defendants have thirty days to object. The trustee then has twenty days to reply. Once all motions related to costs are filed, the Clerk will refer them to Chambers. A hearing will be scheduled if necessary.

SO ORDERED.

Dated at San Juan, Puerto Rico, this 20th day of July, 1995.

By the Court:

GERARDO A. CARLO

GERARDO A. CARLO
U.S. Bankruptcy Judge

Certificate of mailing
ILLEGIBLE

8/1/95 ILLEGIBLE Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Case No. 82-01460 (GAC)
Chapter 13
Adv. No. 94-0044

IN RE:
JOSE MENDEZ ROSADO AND
ALEJANDRA BECERRA ESPINOSA
DEBTORS,

MARIA LUISA CONTRERAS, TRUSTEE,
PLAINTIFF,
v.
JOSE MENDEZ ROSADO, ET AL.,
DEFENDANTS.

JUDGMENT

IN ACCORDANCE WITH MEMORNADUM OPINION AND ORDERT ENTERD BY THE HONORABLE GERARDO A. CARLO ON JULY 21, 1995, IT IS NOW

ADJUDGED and DECREED that summary judgment be and is hereby entered in favor of Trustee on the third cause of action and against the defendants Jose Cuevas Segarra, Amneris Martinez and the conjugal partnership constituted between them, Antonio Concepcion and Agna Morales and the conjugal partnership between them, for the sum of $27,456.00 together with interest at the legal rate from May, 1989 until repaid, plus costs attributable to the third cause of action in this complaint. And it is further

ADJUDGED and DECREED that the defendats' joint cross motion for summary judgment be and is hereby denied.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 31st day of July, 1995.

CELESTINO-MATTA-MENDEZ
Clerk of the Court

s/LITZA M. CARDONA
By: LITZA M. CARDONA
Chief Clerk

CC; M.L. CONTRERAS, ESQ.
ROBERTO A. ANGUEIRA, AUST
SILVIA LUGO
IVAN M. FERNANDEZ, ESQ.
JUAN A. MOLDES, ESQ.
JOSE F. CARDONS-JIMENEZ, ESQ.
ELI B. ARROYO, ESQ.
ANTONIO CONCEPCION, ESDQ.
CARLOS G. BATISTA-JIMENEZ, ESQ.
8/1/95

ILLEGIBLE CARDON
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Case No. 82-01460 (GAC)
Chapter 7
Adv. No. 94-0044

IN RE:
JOSE MENDEZ ROSADO AND
ALEJANDRA BECERRA ESPINOSA
DEBTORS,

MARIA LUISA CONTRERAS, TRUSTEE,
PLAINTIFF,
v.
JOSE MENDEZ ROSADO, ET AL.,
DEFENDANTS.

DECISION AND ORDER

BACKGROUND

Before the Court is a joint motion by Jose A. Cuevas Segarra, Amneris Martinez and the conjugal partnership constituted by them (collectively "Cuevas") and Antonio R. Concepcion Velazquez, Agna Morales and the conjugal partnership constituted by them (collectively "Concepcion") to alter or amend judgment pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedure (dkt. #76). The trustee filed an opposition to the joint motion (dkt. #78).

On July 21, 1995, the Court entered a Memorandum Opinion and Order granting the trustee summary judgment against the above named defendants on the trustee's third cause of action in the amount of $27,456.00, with interest at the legal rate from May 1989 until repaid and the trustee's costs attributable to the third cause of action. Judgment was entered on August 1, 1995.

Cuevas and Concepcion are requesting reconsideration of the Court's Opinion and Order on four grounds. First, they argue that the trustee had the obligation to obtain the Court's approval for their appointment as special counsel and accordingly, the Court should determine that he is the responsible officer before the Court. Second, they argue that the Court erred in concluding that the trustee was entitled to turnover of the funds pursuant to 11 U.S.C. § 105(a) irrespective of the time limitation imposed by 11 U.S.C. § 549. Third, they argue that a trustee seeking to avoid a post-petition transfer of property of the estate may only proceed under 11 U.S.C. § 549 and the two year statute of limitations under this section had run prior to the filing of this action. Fourth, they argue that the judgment should be amended to direct Cuevas and Concepcion to turn over to the trustee the amounts that each received as compensation for their professional services. They indicate that the sum of $27,456.00 was divided equally between them. Thus, if they are found liable, they argue that each should be held liable in the amount of $13,728.00.

The trustee argues that the motion for reconsideration may have been untimely. The trustee also opposes the other arguments raised by the defendants. The trustee indicates that the argument regarding Urrutia's obligation to obtain the appointment of Cuevas and Concepcion was not raised prior to the motion for reconsideration and thus may not be raised now. The trustee also argues that this argument has no merit. The trustee argues that the defendants' arguments regarding use of 11 U.S.C. §§ 105(a) and 549 are simply a repetition of the arguments raised in the answer to the trustee's motion for summary judgment. With respect to the amounts that Cuevas and Concepcion each received, the trustee does not dispute that the sum of $27,456 was divided equally between them, but still argues that they should be held jointly and severally liable for the entire amount in this action.

DISCUSSION

Pursuant to Fed.R.Civ.P. 59, made applicable by Fed.R.Bankr.P. 9023, a motion to alter or amend a judgment must be served not later than 10 days after the entry of judgment. Service by mail is complete upon mailing. Fed.R.Civ.P. 5(b), made applicable by Fed.R.Bankr.P. 7005(b). In this case, the judgment which Cuevas and Concepcion request the Court to reconsider was entered on August 1, 1995. Their motion for reconsideration was filed with the Court on August 11, 1995 and the certificate of service attached to the motion indicates that it was mailed on the same date to the other parties. Thus, the Court finds that the motion was filed and served not later than 10 days after the entry of judgment and therefore is timely.

Cuevas and Concepcion attempt to evade their liability to turn over to the trustee the unauthorized professional fees received from this estate by arguing that the former trustee, Urrutia, had the obligation to obtain the Court's approval for their appointment as special counsel and accordingly, the Court should determine that Urrutia is the responsible officer before the Court. The Court agrees that the trustee in a Chapter 7 case is the only entity that has the authority to apply for the appointment of an attorney to represent or assist the trustee in carrying out the trustee's duties under Title 11.[1] See 11 U.S.C. § 327(a) and Fed.R.Bankr.P. 2014(a). It is well settled, however, that a trustee's failure to seek the appointment of counsel does not allow unappointed counsel to retain fees received from property of a bankruptcy estate. To the

[1] Cuevas and Concepcion indicate that the Court concluded to the contrary in the Court's Memorandum Opinion and Order of July 21, 1995. The Court did not intend to draw this legal conclusion. Unfortunately, confusion arose in this case because Cuevas and Concepcion referred to themselves as attorneys for debtors. Some of the confusion existed because after the debtors filed bankruptcy the malpractice action continued with the debtors listed as plaintiffs. Then, the initial application to appoint Geigel to prosecute the action was filed by debtors. Concepcion later filed a motion on behalf of debtors seeking the appointment of himself and Cuevas.

contrary, "[f]ailure to receive court approval for the employment of a professional in accordance with § 327 and Rule 2014 precludes the payment of fees." *In re Shirley*, 134 B.R. 940, 944 (9th Cir. BAP 1992) (citations omitted). A noted bankruptcy commentator states that:

> [w]hen there is no compliance with the Code or Rules, a professional may forfeit his or her right to compensation. The services for which compensation is requested should have been performed pursuant to appropriate authority under the Code and in accordance with an order of the court. Otherwise, the person rendering services may be an officious intermeddler or a gratuitous volunteer. The purpose of the rule requiring prior court authorization of employment is to provide the court with a means of control over administrative expenses. Thus an attorney who acts for a trustee or on behalf of a trustee without approval by the court may be denied any compensation even though valuable services were rendered in good faith. Normally in the absence of an order of retention, the applicant must look to its own client for compensation.

2 *Collier on Bankruptcy*, ¶ 327.02 at 327-11 — 327-17 (15th ed. Supp. 2/94) (footnotes omitted). Thus, regardless of the fact that it may have been Urrutia's responsibility to file the application for the employment of Cuevas and Concepcion, they were not entitled to compensation for professional services rendered to the trustee or the estate without an order approving their employment.

Moreover, a professional has no entitlement to professional fees in connection with a bankruptcy case without the Bankruptcy Court's approval of the professional's application for compensation. See 11 U.S.C. § 330(a)(1)-(a)(1)(A) and Fed.R.Bankr.P. 2016(a). Without compliance with the Bankruptcy Code and Bankruptcy Rules requiring the filing of an application for compensation, there is no right to compensation. *Albers* v. *Dickenson*, 127 F.2d 957, 961 (8th Cir. 1942); *In re Lavender*, 48 B.R. 393, 396 (Bankr. E.D. Ark.

1984); 2 *Collier on Bankruptcy*, ¶ 330.03 at 330-16.2 — 330-16.3 (15th ed. Supp. 3/95)(footnotes omitted). Because Cuevas and Concepcion have never filed an application for compensation in this case, at no time did they become legally entitled to receive professional fees from this estate.

The second and third arguments raised by Cuevas and Concepcion relate to issues that were addressed in this Court's previous Opinion and Order. Cuevas and Concepcion argue that the Court erred in concluding that the trustee was entitled to turnover of the funds pursuant to 11 U.S.C. § 105(a), irrespective of the time limitation imposed by 11 U.S.C. § 549. They also argue that a trustee seeking to avoid a post-petition transfer of property may only proceed under 11 U.S.C. § 549. In this Court's Memorandum Opinion and Order, the Court discussed the availability of 11 U.S.C. §§105(a) and 542 in this particular case and concluded that both were available to the trustee and that pursuant to both sections the trustee was entitled to turnover of the funds. Thus, rather than repeating the discussion from the earlier Memorandum Opinion and Order, the Court will adopt the discussion from pages 9 through 15 as if restated here.

Finally, Cuevas and Concepcion argue that the judgment should be amended to direct them to turn over to the trustee the amounts that each received as compensation for their professional services. They indicate that the sum of $27,456.00 was divided equally between them. As the trustee does not dispute Cuevas and Concepcion's representations as to how the funds were split, the Court concludes that each should be held liable for that portion of the fees actually received. Thus, the judgment will be amended to indicate that each is liable in the amount of $13,728.00.

ORDER

Wherefore, IT IS ORDERED that the joint motion by Cuevas and Concepcion to alter or amend judgment is granted to the extent that they request that the amount of the judg-

ment be divided evenly between them. The joint motion shall be, and hereby is, denied in all other respects. The defendants, Jose Cuevas Segarra, his spouce, Amneris Martinez, and the conjugal partnership constituted between them are liable to the trustee on the third cause of action in the amount of $13,728.00. The defendants Antonio Concepcion, his spouse, Agna Morales, and the conjugal partnership constituted between them are liable to the trustee on the third cause of action in the amount of $13,728.00.

There being no just reason for delay, the Clerk shall enter an amended judgment in favor of the trustee and against the aforementioned defendants on the third cause of action, in the sums indicated above together with interest thereon at the legal rate from May 1989 until repaid.

SO ORDERED.

Dated at San Juan, Puerto Rico, this 27th day of October, 1995.

O.D. NOV 03 1995

cc: J. Cuevas
A. Concepcion
M. Contreras
R. Claudio Ortiz
UST
11/6/95

By the Court:

Gerardo A. Carlo

Gerardo A. Carlo
U.S. Bankruptcy Judge

in the united states bankruptcy court
for the district of puerto rico

Bankruptcy No. 82-01460 ESL
Chapter 7
Adv. 94-0044

IN RE:
JOSE MENDEZ ROSADO & ALEJANDRA BECERRA ESPINOSA
debtors,

MARIA LUISA CONTRERAS, TRUSTEE FOR THE ESTATE OF JOSE MENDEZ ROSADO & ALEJANDRA BECERRAESPINOSA
plaintiff,

v.

JOSE MENDEZ ROSADO, ALEJANDRA BECERRA ESPINOSA AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; JOSE CUEVAS SEGARRA, AMNERIS MARTINEZ AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; ANTONIO CONCEPCION, AGNA I. MORALES CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; HECTOR URRUTIA CATHY DOE AND THE CONJUGAL PARTNERSHIP CREATED BETWEENTHEM; THE HOME INSURANCE COMPANY; CORPORACION INSULARDE SEGUROS,
DEFENDANTS

AMENDED COMPLAINT

To The Honorable Court:

Comes, now, Maria Luisa Contreras, duly appointed Trustee in the above captioned case, and acting as her own appointed counsel, very respectfully states and prays:

PARTIES:

PLAINTIFF:

MARIA LUISA CONTRERAS, is the duly appointed Chapter 7 Trustee in the instant case. She was appointed successor Trustee on February 2, 1994 and authorized to act as her own counsel.

DEFENDANTS:

J0SE MENDEZ R0SAD0, a natural person, is a co-debtor in the instant bankruptcy case. On October 6, 1982, he filed a petition for relief under Chapter 7, together with his spouse and co-defendant herein, Aleandra Becerra Espinosa. Jose Mendez Rosado will, hereinafter, vbe referred to as Mendez.

ALEJANDRA ECERRA ESPIN0SA, a natural person, is a co-debtor in the instant bankruptcy case. On October 6, 1982, she; filed a petition for relief under Chapter 7, together with her spouse and co-defendant herein Jose Mendez Rosado. Alejandra Becerra Espinosa will, hereinafter, be referred to as BECERRA.

JOSE CUEVA SEGARRA, a natural person, is a resident of Puerto Rico and to the best of plaintiff's knowledge and belief, an attorney-at-law, currently engaged in the practice of law within the Commonwealth of Puerto Rico. Jose Cuevas Segarra, hereinafter referred to as CUEVAS, represented co-defendants MENDEZ and BECERRA in a medical malpractice lawsuit before the courts of the Commonwealth of Puerto Rico. This law suit will hereinafter bereferred to as the SUPERIOR COURT CASE.

AMNERIR MARTINEZ SANCEZ is the wife of co-defendant CUEVAS, and a member of the conjugal partnership constituted between them.

THE CONJUGAL PARTNERIP COMP0SED OF JOSE CUEVAS AND AMNERIB MARTINEZ SANCEZ is an entity created and existing under the laws of Puerto Rico which benefited from the acts of its members referred to in this complaint.

ANTONIO CONCEPCION, a natural person, is a resident of Puerto Rico and to the best of plaintiff's knowledge and

belief, an attorney-at-law, currently engaged in the practice of law within the Commonwealth of Puerto Rico. Antonio Concepcion, hereinafter referred to as CONCEPCION, represented co-defendants MENDEZ and BECERRA, together with CUEVAS, in the Superior Court case.

MARY DOE is a fictitious name used to identify the wife of co-defendant CONCEPCION, whose name at the time of the filing of this complaint is unknown, and a member of the conjuqal partnership constituted between them.

THE CONJUGAL PARTNESHIP COMP0SED BETWEEN ANTONIO CONCEPCION AND MARY DOE is an entity created and existing under the laws of Puerto Rico which benefited from the acts of its members referred to in this complaint.

HECTOR URUTIA is a natural person, resident of Puerto Rico, and to the best of Plaintiff's knowledge and belief, an attorney authorized to practice within the Commonwealth of Puerto Rico. Hereinafter, he will be referred to as URRUTIA. On July 30, 1986, URRUTIA was appointed Chapter 7 trustee in the case of MENDEZ and BECERRA. On September 16, 1993 URRUTlA resigned as trustee.

CATHY DOE is a fictitious name used to identify the wife of co-defendant URRUTIA, whose name at the time of the filing of this complaint is unknown, and a member of the conjugal partnership constituted between them.

THE CONJUGAL PATNERHIP COMPOSED BETWEEN HECTOR URRUTIA AND CATHY DOE is an entity created and existing under the laws of Puerto Rico which benefited from the acts of its members referred to in this complaint.

THE HOME INSURANCE COMPANY, to the best of plaintiff's knowledge and belief, is a company authorized to do business within the Commonwealth of Puerto Rico. This entity was a party to the Superior Court case, in which the co-defendants in the case at bar, MENDEZ and BECERRA were plaintiffs, represented by CUEVAS and CONCEPCION. HOME made a portion of the payment that resulted from a transaction which was reached between the parties in the

Superior Court case. Hereinafter, this co-defendant will be referred to as HOME.

CORPORACION INSULAR DE SEGUROS, to the best of plaintiff's knowledge and belief, is a company organized under the laws of the Commonwealth of Puerto Rico and authorized to do business within Puerto Rico. This entity was a party to the lawsuit before the Superior Court, in which the co-defendants MENDEZ and BECERRA were plaintiffs represented by CUEVAS and CONCEPCION. This entity made a portion of the payment that resulted from the transaction which was reached between the parties in the Superior Court case. Hereinafter this co-defendant will be referred to as INSULAR.

JURI8DICTION, CODE, AND LEGAL BASIS:

This Court has jurisdiction to entertain the present matter pursuant to 28 USC §§157 and 1334. The matter is a core proceeding pursuant to 28 USC § 157 (b)(2)(E) and (J). This complaint is brought as an action under 11 USC §§ 521(4); 542; 727(d)(2) and (3); 327 and 31 L.P.R.A. §§ 5141. Federal Rules of Bankruptcy Procedure 7001 et. seq are applicable to this proceeding.

FACTS:

1. On or around October 6, 1982, co-defendants MENDEZ and BECERRA filed a joint bankruptcy petition under Chapter 7 of the Bankruptcy Code.

2. The bankruptcy Schedules and Statement of Financial Affairs were originally filed by co-defendants MENDEZ and BECERRA on October 29, 1982. After this date, these documents were amended at least three times to include assets which were property of the estate and that debtors had omitted from the original documents.

3. In these amendments, co-defendants included personal property, such as household goods, firearms, jewelry, equipment of certain bakery owned by them, and a detail of investments made by third parties in this bakery. All of this information was supplied by co-defendants as aresult of several meetings of creditors held pursuant to 11 USC § 341, where

the information was discovered and co-defendants were required by the Trustee to amend the Schedules.

4. Likewise, as a result of these meetings of creditors, it became known that co-defendants had filed a lawsuit, pre-petition, in the state court against certain medical doctors. This lawsuit, property of the estate, had not been included by co-defendants in their original Schedules, and they disclosed this information only when required by the Trustee. They amended Schedules on July 1, 1983 to formally include the lawsuit as property of the estate.

5. In November, 1983, co-defendants MENDEZ and BECERRA, requested the appointment of counsel Wilfredo Geigel to reresent the estate in the matter pending before the Superior Court. In this document, MENDEZ and BECERRA specifically accept and admit that the legal matter pendinq before the Superior Court of Puerto Rico is subject to the administration of the estate by the Bankruptcy Court. This application was granted during a hearing held on February 14, 1984. The order was entered on March 8, 1984, and specifically advised that any agreement reached between the parties had to be approved by the Bankruptcy Court and the Trustee had to be part of any agreement.

6. MENDEZ and BECERRA's order of Discharge was entered on June 20, 1984.

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[1] On July 24, 1985, Johnny Elias, Esq., the duly apponted trustee at that tlme, filed a motlon requestlng order (Docket 69), directlng the debtors to deliver the following non-exempt assets:

a. Living room set
b. Bedroom set
c. Chlldren bedroom set
d. Refrigerator
e. Sofa
f. Kitchen appliances
g. TV sets
h. Jewelry
i. Bakery equipment
j. Any other property

On or around January 15, 1986, the trustee filed a second motion requesting order to deliver the equipment (Docket 73).

7. On March 12, 1986, the Court entered an Order directing MENDEZ and BECERRA to deliver to the Trustee all non-exempt property[1] of the estate. The co-defendants never complied with this Court Order.

8. On or around August 26, 1988, co-defendant CONCEPCION filed a motion entitled "Motion for Designation of Special Counsels", wherein he requested that he and co-defendant CUEVAS be appointed special counsel to debtors (replacing the prior attorney) in the lawsuit pending before the Superior Court. This request was denied without prejudicefor failure to comply with Local Bankruptcy Rule 2016. Nonetheless, both CUEVAS and CONCEPCION were aware of their obligation to seek Court appointment.

9. This application was never amended, nor was a new one filed. Nonetheless, co-defendants CONCEPCION and CUEVAS represented the estate of MENDEZ and BECERRA in the Superior Court proceedings, without the approval of the Bankruptcy Court.

10. On July 30, 1986 co-defendant URRUTIA was appointed Chapter 7 successor trustee in the bankruptcy case (EOD August 11, 1986). As trustee URRUTIA failed to perform his duties as required by the Bankruptcy Code.

11. As reflected in the Court's files, and other documents in Plaintiff's possession, URRUTIA failed to administer the bankruptcy case, and furthermore, failed to monitor the proceedings which were pending before the local court. URRUTIA, apparently, did nothing concerning the administration of the estate.

12. URRUTIA was negligent, giving incorrect information regarding the status of thebankruptcy case; the status of the lawsuit; the jurisdiction of the Bankruptcy Court over the Superior Court case, and further allowed co-defendants CUEVAS, CONCEPCION, MENDEZ and BECERRA to receive abd retain property of the estate.

13. URRUTIA knew, or should have known, that the lawsuit in the superior Court wasproperty of the estate; that there was a Bankruptcy Court order directing the trustee

to participate in any transaction reached between the parties, that the Bankruptcy Court had jurisdiction over the lawsuit, and that the bankruptcy case was not closed. In fact, it should have been patently obvious that the case was not closed, because URRUTIA himself was the appointed trustee, and at the date of the transaction in the Superior Court, had not filed a final accounting of the case, nor had he requested that the case be closed. As of today's date, URRUTIA has not filed a final accounting of his work as trustee nor has he been discharged.

14. URRUTIA failed to perform any work whatsoever as trustee He failed to protect the interests of the estate, and he failed in his fiduciary duty to the creditors. URRUTIA's negligence and failure to act caused damages to the estate in the amount of not less than $83,200.

15. On February 21, 1989, the Honorable Pedro Lopez Oliver Superior Court Judge for San Juan, entered a judgment approving stipulation between the parties to the lawsuit. The judgment provided for the payment of $70,000 to six co-plaintiffs by co-defendant HOME.

16. In addition to the judgment, co-defendant Mendez testified, at a meeting of creditors held on May 3, 1994, that there was an extrajudicial payment of $30,000 by one of the insurance companies, co-defendant INSULAR. This information is also confirmed in a letter sent by the insurer's attorney to co-defendant CUEVAS.

17. From the total of $100,000, co-defendants MENDEZ and BECERRA received $83,200.00; $58,000 from the judgment, and $25,200 from the extrajudicial payment.

18. Co-defendants CUEVAS and CONCEPCION collected from these funds $27,456 as compensation for their services. Of this amount $19,140 was collected from the judgment and $8,316 from the extrajudicial payment. The total was divided equally between the two co-defendants. These funds were and are property of the estate of MENDEZ and BECERRA; CUEVAS and CONCEPCION had no right to retain this money without prior approval of the Bankruptcy Court, and

much less without having been appointed by the Bankruptcy Court as special counsels.

19. The Trustee of the bankruptcy case at that time, URRUTIA, did not form part of the agreement, the Bankruptcy Court was not informed of the agreement, did not ratify the same, nor did the estate receive any of the funds it was entitled to as a result of these transactions. Furthermore, CUEVAS in a motion filed in Superior Court on February 6, 1989, stated that because co-defendants MENDEZ and BECERRA had received a discharge there was no obstacle to the Superior Court's approval of the transaction and stipulation agreed to among the parties. The Superior Court approved the transaction based on this misinformation.

20. On May 3, 1994, a Special Meeting of Creditors was held in the instant bankruptcy case. Both co-defendants MENDEZ and BECERRA appeared and submitted to examination.

21. As a result of this examination, it became apparent that MENDEZ and BECERRA failed to include information required in their Schedules. They have consistently provided information only when confronted with the truth. Assets have been discovered by the Trustees and creditors who have been involved in this case, and only then have debtors admitted to their existence.

22. For example, in addition to the assets listed in the Schedules, and multiple amendments thereto, MENDEZ and BECERRA also owned, at the time of the filing of the Bankruptcy petition, a pawn shop where they bought and sold gold. This had never been disclosed by them in the numerous previous meetings held in this case, nor included in their Schedules. Only now, 12 years after the filing of the petition do they disclose the existence of this asset.

23. MENDEZ and BECERRA also failed to include in the Schedules a debt owing to Small Business Administration, agency which held a secured claim with a second lien over their apartment which had been the object of foreclosure proceedings before the filing of the petition.

24. In addition to the above, the Schedules indicated that MENDEZ was the principal owner of Rio Grande Bakery, Inc. This information is false, as the bakery in question was not a corporation, but a business wholly owned and operated by MENDEZ and BECERRA. As such, the information provided was misleading to creditors and to the court, caused confusion, was incorrect, an enabled debtors to continue operating this business, when instead the keys to the business should have been delivered to the Trustee for its proper administration as property of the estate.

LEGAL ARGUMENTS:

25. Upon the filing of a bankruptcy petition, Section 521 of the Bankruptcy Code requires debtors to file Statements of Affairs and Schedules in which they list *all of their assets, liabilities and further disclose their Financial Affairs.* This requirement is not one which debtors may choose to ignore or to selectively include some information and omit other.

26. In addition, the above cited Section also states that if a Trustee has been appointed, then the debtors are required to cooperate with the Trustee and to deliver to him all property of the estate. 11 USC §521(3) and (4).

27. The ultimate benefit conferred upon a debtor by the Bankruptcy Code, is the discharge, which in essence discharges a debtor from most, if not all, pre-petition liabilities and allows him to have a fresh start, free from the harassment of his creditors.

28. Section 727(a) of the Bankruptcy Code dictates that a debtor will be granted a discharge, except under certain circumstances. Some of these circumstances are: 1) the debtor, with the intent to hinder, delay or defraud, has concealed, mutilated, or destroyed property of the estate after the filing of the petition; 2) the debtor knowingly and fraudulently made a false oath or account; and that 3) the debtor has refused to obey lawful orders of the court other than orders to respond to a material question or to testify.

If a debtor has incurred in any one or more of these actions, then the discharge may be denied or revoked. 11 USC §727(a)(2)4) and (6).

29. A Trustee may request the revocation of the discharge Pursuant to §727. Under the provisions of 11 USC §727(d)(2), upon application by the Trustee, the Court may revoke a discharge granted under subsection (a) if the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the Trustee. Likewise, if the debtor has refused to obey a Court order, the discharge may also be revoked. 11 USC §727(d)(3).

30. A proceeding to revoke the discharge of a debtor under Section 727(d)(2) or (3) may be commenced before the later of one year after the discharge is granted or the date the case is closed. 11 §USC 727(e)(2)(A)(B).

31. On the other hand, Secton 542 of the Bankruptcy Code, provides a mechanism for the recovery of assets of the estate which are in the possession, custody or control of an entity. In order to properly administrate and liquidate or reorganize, a Trustee in a bankruptcy proceeding must have access to all the assets of the estate, which may be used, sold or leased. The delivery of these assets, for the benefit of the estate, is compelled by 11 USC §542.

32. The Trustee in the instant matter, requires the use of the assets acquired and/or retained by co-defendants MENDEZ, BECERRA, CONCEPCION, and CUEVAS. The funds these co-defendants received from the settlement of the lawsuit are admittedly property of eetate which may be used by the Trustee.

33. A trustee appointed to administrate a case under the Bankruptcy Code owes a fiduciary duty to the creditors of the estate. One of his primary responsibilities is to collect and reduce to money all assets, property of the estate, and distribute the same among the creditors. 11 USC §704.

34. A trustee's conduct should be judged by the reasonable care and due diligence standard. *In re Rigden*, 795 F.2d. 727 (9th Cir. 1986).

35. Pursuant to Article 1802 of the Civil Code of Puerto Rico, any person, who by act or omission causes injuries to another, is personally liable for those damages. 31 L.P.R.A. §5141.

36. An action for damages against a former trustee prescribes one year after the successor trustee knows, or has reason to know, the basis of the action. *In Re San Juan Hotel Corp.*, 847 F.2d 931 (1st Cir. 1988).

37. The statute of limitations to file an action against a bankruptcy trustee, for personal liability, begins to run on the date the trustee is discharged from his duties. *In re San Juan Hotel Corp., id.*

38. URRUTIA resigned as trustee on September 16, 1993. As of the date of the filing of this complaint, he has not filed a final accounting of his work as trustee, nor has he received a discharge. As such, URRUTIA has not been relieved from liability and the time to file an action has not yet begun to run.

39. The Bankruptcy Court has jurisdiction to hear cases "related to" bankruptcy proceedings. However, the Bankruptcy Court, for reasons of judicial efficiency or respect for State law, may abstain from hearing a proceeding related to cases under title 11 28 USC §§ 1334 and 157.

40. The district court in which a case under title 11 is commenced or is pending has exclusive jurisdiction of the property of the estate. 28 USC §1334(d).

41. In the District of Puerto Rico, cases arising under title 11 and proceedings arising under title 11 or arising in or related to cases under title 11 have been referred to the Bankruptcy Court pursuant to 28 USC §157(a).

42. Bankruptcy law requires that professionals who render services to the estate, whether representing the trustee or debtor in the bankruptcy case, or in proceedings related in any way to the bankruptcy case, file an application for appointment (11 USC §327). This application is subject to the

approval of the Bankruptcy Court. Failure to obtain said appointment may be to disgorge fees. Professional must also apply to the Court for payment of fees (11 USC §330).

FIRST CAUSE OF ACTION:

Co-defendants MENDEZ and BECERRA have refused to obey court orders directing them to deliver property of the estate (Order dated March 12, 1986); they have, with the intent to hinder, delay or defraud, steadfastly omitted information regarding the estate's assets; have retained property of the estate in their possession; and finally have acquired property of the estate, and failed to report the same to the Court and/or deliver it to the Trustee for distribution among the creditors; all of this in violation of Section 727 of the Bankruptcy Code.

RELIEF REQUESTED UNDER THE FIRST CAUSE OF ACTION:

Plaintiff requests that the Court find that co-defendants MENDEZ and BECERRA have violated Section 727 of the Code and as a result that their discharge be revoked.

SECOND CAUSE OF ACTION:

Co-defendants MENDEZ and BECERRA have acquired funds as a result of the settlement of a lawsuit. These monies were property of the estate, as was the cause of action. They have failed to report the acqusition of these funds or to deliver the same to the Trustee as required by Secton 542 of the Bankruptcy Code. Likewise, since the beginning of the case, MENDEZ and BECERRA refused to deliver to the trustee non-exempt property of the estate. The conjugal partnership created between them has benefited from all of these acts.

RELIEF REQUESTED UNDER THE SECOND CAUSE OF ACTION:

Plaintiff reuests that this Court find that co-defendants MENDEZ and BECERRA have acquired and have retained

in their possession, property of the estate, which may be used by the Trustee which they have failed to return to and/or inform the Trustee, and that an order be entered, pursuant to Section 542 of the Bankruptcy Code, directing them to immediately deliver this property and or the equivalent in value, to the Trustee. Trustee further requests that this Court find that the conjugal partnership created between MENDEZ & BECERRA has benefited from their acts, and that it be held liable for all moneys and property owed to the estate by MENDEZ and BECERRA.

THIRD CAUSE OF ACTION:

Co-defendants CONCEPCION and CUEVAS, represented the estate as their attorneys in the legal proceedings before the Superior Court. They did this without the required Court authorization. Their appointment was never approved, and yet, in spite of knowing this fact, and being cognizant of the need to obtain authorization, they chose to ignore this requirement and prosecute the case. CUEVAS and CONCEPCION retained estate funds in payment of their professional fees for legal services rendered during the lawsuit. These funds belonged to the estate, and only through a Bankruptcy Court order could CUEVAS and CONCEPCION legally have acquired said funds. CUEVAS and CONCEPCION have retained property of the estate in their possession, and should be ordered to return the same. Amneris Martinez and Mary Doe as spouses of CUEVAS and CONCEPCION, respectively, as well as the conjugal partnerships created between CUEVAS and Amneris Martinez and CONCEPCION and Jane Doe, have benefited from the acts of CUEVAS AND CONCEPCION, and as such should be held liable for all monies owed by CONCEPCION and CUEVAS to the estate.

RELIEF REQUESTED IN THE THIRD CAUSE OF ACTION:

Pursuant to Section 542 of the Banruptcy Code, any entity in possession, custody or control of estate property must return

the same to the Trustee. The Trustee of this estate, requires these funds for the administration of the case and prays that CUEVAS and CONCEPCION be ordered to return to the estate all estate funds they have received. Trustee further requests that Mary Doe, Amneris Martinez and the conjugal partnerships created between them and CUEVAS and CONCEPCION, respectively, be held liable for all monies owed by the latter to the estate.

FOURTH CAUSE OF ACTION:

During his appointment as trustee, URRUTIA failed to perform any duties whatsoever, for the benefit of the estate and its creditors. On the contrary, he disregarded Court Orders instructing him to participate in the transaction that led to the settlement of the Superior Court lawsuit, because the cause of action belonged to the estate. By abdicating his duties as trustee, URRUTIA caused damages to the estate. Furthermore, URRUTIA knowingly gave information that was incorrect and in doing so, was negligent, causing damages to the estate of MENDEZ and BECERRA.

RELIEF REQUESTED IN THE FOURTH CAUSE OF ACTION:

Pursuant to Article 1802 of the Civil Code of Puerto Rico, URRUTIA is liable for the damages his omission and negligence in the performance, (or non-performance), of his duties caused the estate of MENDEZ and BECERRA. Plaintiff requests that URRUTIA be found to have caused damage to the estate due to his negligence and omissions, and that he be ordered to reimburse the estate for these damages. Trustee also requests that Cathy Doe and the conjugal partnership created between her and URRUTIA be held liable for all damages caused by URRUTIA's negligence and omissions.

FIFTH CAUSE OF ACTION:

The Bankruptcy Court exercised its discretionary abstention powers, by allowlng the Superior Court to entertain the law-

suit already pending before that court at the time of the filing of the petition. However, the Bankruptcy Court specifically reserved jurisdiction as to the final approval of any settlement agreement could have been reached in the case.

Furthermore, 28 USC §1334(d), grants the District Courts, (and the Bankruptcy Courts pursuant to 28 USC §157), exclusive jurisdiction over the property of the estate. The cause of action pending at the time of the filing of the Bankruptcy was property of the estate. Thus, any agreement entered without the Bankruptcy Court's approval, and in open violation of its orders, is null and void.

RELIEF REQUESTED UNDER THE FIFTH CAUSE OF ACTION:

Trustee requests that this Court find that the stipulation entered into by and between co-defendants MENDEZ and BECERRA and the defendants in the Superior Court case be found to be null and void for it was reached in open violation of a Bankruptcy Court order to the contrary. The Judgment entered by the Honorable Pedro Lopez Oliver of the Superior Court of San Juan, is also null and void for it was issued without knowledge and based on misinformation provided by CUEVAS AND CONCEPCION. The Judge was unaware that his order was contrary to a Bankruptcy Court order and that any deciion was subject to ratification by the Bankruptcy Court.

SIXTH CAUSE OF ACTION:

The co-defendants HOME and INSULAR were well aware of co-defendants' bankruptcy case and of the necessity of obtaining the Bankruptcy Court's approval of the proposed settlement. Nonetheless, these co-defendants chose to ignore these requirements and agreed to pay, and did pay, $83,200 to co-defendants MENDEZ, BECERRA, CUEVAS and CONCEPCION.

RELIEF REQUESTED IN SIXTH CAUSE OF ACTION:

Trustee requests that co-defendants HOME and INSULAR be ordered to pay to the estate of MENDEZ and BECERRA, the sum of $83,200 plus interest, which should have been paid to the estate at the time of the Judgment, but which they paid directly to the co-defendants in open violation of an order of the Bankruptcy Court.

SEVENTH CAUSE OF ACTION:

Section 327 of the Bankruptcy Code requires that any person wishing to represent the estate or the trustee or debtor, apply for authorization from the Bankruptcy Court to act as counsel. Applicant must submit a statement as required by Rule 2016. Co—defendants CUEVAS and CONCEPCION knew of this requirement and failed to obtain the same before performing services for the estate. Such services were followed by payment without compliance with Section 330 of the Code.

RELIEF REQUESTED IN SEVENTH CAUSE OF ACTION

Trustee requests that this Honorable Court enter an order directing co-defendant CUEVAS and CONCEPCION to disgorge all monies received as compensation for professional services in the lawsuit in Superior Court. They represented the estate, who owned the cause of action. Notwithstanding, they failed to obtain the necessary authorization as required by Section 327. This failure and non-compliance with Section 330 is sufficient cause for the court to order them to disgorge all fees received plus interest. Specifically, it is requested that an order be entered to them and to their spouses and conjugal partnerships to return $27,456 plus interest to the estate of MENDEZ and BECERRA.

[Certificate of Service Omitted]

RESPECTFULLY SUBMITTED on this 3rd day of October, 1994.

MARIA LUISA CONTRERAS

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PO Box 2124
San Juan, PR 00903
Tel. 759-7450

JM.019

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Case No. B82-01460 (GAC)
Chapter 7
Adv. No. 94-0044

IN RE:
JOSE MENDEZ ROSADO AND
ALEJANDRA BECERRA ESPINOSA
DEBTORS,

MARIA LUISA CONTRERAS, TRUSTEE FOR THE ESTATE OF JOSE MENDEZ ROSADO AND ALEJANDRA BECERRA ESPINOSA
PLAINTIFF,
v.
JOSE MENDEZ ROSADO, ALEJANDRA BECERRA ESPINOSA AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; JOSE CUEVAS SEGARRA, JANE DOE AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; ANTONIO CONCEPCION, MARY DOE AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; AND HECTOR URRUTIA, CATHY DOE AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM,
DEFENDANTS.

CROSS CLAIM

TO THE HONORABLE COURT:

Come now co-defendants, Jose A. Cuevas Segarra, Amneris Martinez and the conjugal partnership constituted by them (collectively "Cuevas"), through their undersigned counsel and very respectfully state and pray:

1. Dated October 3, 1994, Cuevas was served with a copy of the Amended Complaint.

2. Codefendant Hector L. Urrutia is or may be liable to Cuevas for all o rpart of the claim asserted by Plaintiff.

WHEREFORE, it is respectfully prayed that Urrutia be held liable to Cuevas for all or part of any amount Cuevas be held responsible to Plaintiff.

[CERTIFICATE OF SERVICE OMITTED]

Ponce, Puerto Rico, this 19th day of July, 1995.

Charles A. Cuprill-Hernandez
Law Offices
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Plaza and Cristina Streets
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Tels. (809) 840-5146; 840-5147
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By: CARLOS G. BATISTA-JIMINEZ
CARLOS G. BATISTA-JIMENEZ
USDC - PR 206711

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

Case No. B82-01460 (ESL)
Chapter 7
Adv. No. 0044

IN RE:
JOSE MENDEZ ROSADO AND ALEJANDRA BECERRA ESPINOSA FOR THE ESTATE OF JOSE MENDEZ,
DEBTORS,

MARIA LUISA CONTRERAS, TRUSTEE FOR THE ESTATE OF JOSE MENDEZ ROSADO AND ALEJANDRA BECERRA ESPINOSA,
PLAINTIFFS,
v.
JOSE MENDEZ ROSADO, ALEJANDRA BECERRA ESPINOSA AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; JOSE CUEVAS SEGARRA, JANE DOE AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM; ANTONIO CONCEPCION, AGNA I. MORALES OTERO AND THE CONJUGAL PARTNERSHIP CREATED BETWEEN THEM,
DEFENDANTS.

JOINT CROSS CLAIM

TO THE HONORABLE COURT:

Come now co-defendants, Antonio R. Concepcion, pro se, Agna Morales and the conjugal partnership constituted by them (collectively "Concepcion") and very respectfully state and pray:

That co-defendants, Jose Cuevas Segarra, Amneris Martinez and the conjugal partnership constituted by them (collectively "Cuevas") file a Cross Claim against co-defendant Hector L, Urrutia.

That since "Cuevas" case and ours are identical we are joining his Cross Claim and hereby we are adopting by reference the allegations of said Cross Claim.

WHEREFORE, it is respectfully prayed that Urrutia be held liable to Concepcion for all or part of any amount Concepcion be held responsible to plaintiff.

[CERTIFICATE OF SERVICE OMITTED]

In Carolina, Puerto Rico, this 10th day of August, 1995.

ANTONIO R. CONCEPCION VELAZQUEZ

ANTONIO R. CONCEPCION VELAZQUEZ
Box 3566 Valle Arriba Station
Carolina, P.R. 00985-3566
tel. & Fax 757-4860
USDC-PR 13309

SECTION 549 (11 U.S.C. §549)

§ 549. Postpetition transactions.

(a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —

(1) made after the commencement of the case: and
(2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
(B) that is not authorized under this title or by the court.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of —

(1) two years after the date of the transfer sought to be avoided; or
(2) the time the case is closed or dismissed.